253 N.C. App.—No. 2 Pages 241-409

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 11, 2019

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
DONNA S. STROUD
ROBERT N. HUNTER, JR.
CHRIS DILLON
MARK DAVIS
RICHARD D. DIETZ
JOHN M. TYSON

LUCY INMAN
VALERIE J. ZACHARY
PHIL BERGER, JR.[1]
HUNTER MURPHY[2]
JOHN S. ARROWOOD[3]
TOBIAS S. HAMPSON[4]
ALLEGRA K. COLLINS[5]

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL. JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE

RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS[6]
J. DOUGLAS McCULLOUGH [7]
WENDY M. ENOCHS[8]
ANN MARIE CALABRIA[9]
RICHARD A. ELMORE[10]

[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Retired 31 December 2016. [7]Retired 24 April 2017.
[8]Appointed 1 August 2016. Term ended 31 December 2016. [9]Retired 31 December 2018. [10]Retired 31 December 2018.

Clerk

DANIEL M. HORNE, JR.

Assistant Clerk

Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director

Leslie Hollowell Davis[11]

Jaye E. Bingham-Hinch[12]

Assistant Director

David Alan Lagos

Staff Attorneys

John L. Kelly

Bryan A. Meer

Eugene H. Soar

Nikiann Tarantino Gray

Michael W. Rodgers

Lauren M. Tierney

Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director

Marion R. Warren

Assistant Director

David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson

Kimberly Woodell Sieredzki

Jennifer C. Peterson

[11]Retired 31 August 2018. [12]Began 13 August 2018.

COURT OF APPEALS

CASES REPORTED

FILED 2 MAY 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Administrative Law—contested case—Office of Administrative Hearings—voluntary dismissal—state employee—wrongful termination—The trial court did not err in a wrongful termination case by a state employee by denying respondent N.C. Department of Public Safety's motion to dismiss the employee's second contested case petition. N.C.G.S. § 1A-1, Rule 41(a)(1) applies to contested cases before the Office of Administrative Hearings, and a petition for a contested case hearing may be voluntarily dismissed and refiled within one year. **Cole v. N.C. Dep't of Pub. Safety, 270.**

APPEAL AND ERROR

Appeal and Error—appealability—interlocutory appeal—substantial right—forum selection clause—An interlocutory appeal was heard where it involved a forum selection clause, which is a substantial right. **US Chem. Storage, LLC v. Berto Constr., Inc., 378.**

CONSTITUTIONAL LAW—Continued

Constitutional Law—North Carolina—legislature—delegation of power— The delegation of power by the N.C. Department of Transportation for a traffic congestion management project was constitutional where the legislative goals and polices set forth in the statute, combined with procedural safeguards, were sufficient. **WidenI77 v. N.C. Dep't of Transp., 390.**

Constitutional Law—North Carolina—public purpose—traffic congestion relief project—The trial court did not err by concluding that expenditures from a traffic congestion improvement project that would include tolls constituted a public purpose pursuant to Article V, Section 2(1) of the North Carolina Constitution. **WidenI77 v. N.C. Dep't of Transp., 390.**

Constitutional Law—right to speedy trial—delay in bringing before magistrate—holding without bond—The trial court did not err in a prosecution for second-degree murder and other charges by denying defendant's motion to dismiss due to a seven-hour delay in bringing him before a magistrate. Defendant was afforded multiple opportunities to have witnesses or an attorney present, which he elected not to exercise. **State v. Cox, 306.**

CRIMINAL LAW

Criminal Law—guilty plea—motion to withdraw—assertion of innocence—Alford pleas not sufficient—Defendant's assertion of an *Alford* plea was not a sufficient assertion of innocence for a withdrawal of his plea. **State v. Whitehurst, 369.**

Criminal Law—guilty plea—motion to withdraw—coercion—timing— Defendant did not establish a fair and just reason to withdraw a guilty plea where the record did not support his contention that the plea was entered hastily or that he moved promptly to withdraw the plea. There was no authority for the proposition that the incarceration is per se evidence of coercion. **State v. Whitehurst, 369.**

Criminal Law—guilty plea—motion to withdraw—strength of State's evidence—sufficient—Defendant failed to effectively challenge the strength of the State's evidence against him on a motion to withdraw his plea. The prosecutor's summary indicated that the case was simple and straightforward, defendant did not identify evidentiary issues, and defendant did not contend that the case presented complex legal or forensic issues. **State v. Whitehurst, 369.**

Criminal Law—guilty plea—withdrawal of plea—burden not shifted to State—The burden did not shift to the State to show that it was prejudiced in a hearing on a motion to withdraw a guilty plea where defendant did not meet his burden of showing a fair and just reason to withdraw his plea. **State v. Whitehurst, 369.**

EVIDENCE

Evidence—cross-examination—limitation on scope—The trial court did not err in an impaired driving case, resulting in a car accident and death of the other driver, by preventing defendant from cross-examining a witness regarding the contents of a verified complaint in a related civil case. Defendant failed to show that the trial court's decision to limit the scope of cross-examination influenced the jury's verdict. **State v. Cox, 306.**

Evidence—witness interview video—past recorded recollection hearsay exception—corroboration—The trial court did not err in a second-degree murder

PROBATION AND PAROLE

Probation and Parole—revocation—findings—The trial court did not make insufficient findings when revoking defendant's probation. The transcript and judgments reflected that the judge considered the evidence and the judge complied with the relevant statute, N.C.G.S. § 15A-1344(f), by finding good cause to revoke probation. The statute did not require that the trial court make any specific findings. **State v. Regan, 351.**

Probation and Parole—revocation—subject matter jurisdiction—probation from another county—The Harnett County Superior Court had subject matter jurisdiction to revoke defendant's probation in a Sampson County case even though the record did not show a transfer of the case to Harnett County. Defendant was already on probation from a prior Harnett County case, her probation was supervised in Harnett County, she lived in Harnett County, and defendant violated her probation in Harnett County. **State v. Regan, 351.**

PUBLIC OFFICERS AND EMPLOYEES

Public Officers and Employees—state employee—just cause for dismissal—unsatisfactory job performance—The administrative law judge erred by reversing a state employee's termination from his position as a laundry plant manager based on unsatisfactory job performance. The requirements of the North Carolina Human Resources Act under 25 NCAC 01J .0605(b) were met and respondent had just cause to dismiss petitioner based on his failure to become certified as a Laundry Manager and his failure to reconcile receipts and send information and invoices to a central office. **Cole v. N.C. Dep't of Pub. Safety, 270**.

SATELLITE-BASED MONITORING

Satellite-Based monitoring—reasonable search—no determination—An order for lifetime satellite-based monitoring was reversed and remanded where the trial court did not make the reasonableness determination mandated by the U.S. Supreme Court in *Grady v. N.C.*, __U.S.__, 191 L.Ed. 459 (2015). **State v. Johnson, 337.**

SENTENCING

Sentencing—restitution—amount—evidence not sufficient—An order of restitution was reversed and remanded where there was no evidence to support the amount. **State v. Whitehurst, 369.**

SEXUAL OFFENDERS

Sexual Offenders—change of address—failure to report—The trial court correctly denied the motion of sexual offender to dismiss charges involving the failure to register his change of address after he was released from jail. Defendant had registered prior to being jailed for 30 days for contempt. The N.C. Supreme Court has not established a minimum time for the facility imprisoning a registrant to be considered a new address. The defendant in this case was not merely in jail overnight. **State v. Reynolds, 359.**

Sexual Offenders—lifetime registration—findings—A lifetime order to register as a sexual offender was remanded for proper findings where defendant was convicted of sexual offense with a child and sexual activity by a substitute parent and the trial court found that the offenses were reportable and aggravated. Defendant

acknowledged on appeal that he was convicted of reportable offenses but challenged the findings that he was convicted of an aggravated offense. The sexual offenses here may or may not involve the penetration statutorily required for an aggravated offense. **State v. Johnson, 337.**

TAXATION

Taxation—highway tolls—not a tax—The Court of Appeals rejected plaintiff's argument that the General Assembly unconstitutionally delegated its power to tax by authorizing tolls as a part of a highway congestion management program. It has previously been settled in N.C. that a toll is not a tax. **WidenI77 v. N.C. Dep't of Transp., 390.**

TRIALS

Trials—civil—request for jury trial—Asheville Civil Service Board—Only the petitioner, the City of Asheville, had the right to request a jury trial in an appeal from the Asheville Civil Service Board to the Buncombe County Superior Court, and the trial court erred by not dismissing respondent's request for a jury trial. Applying the statutory construction rule that the specific is favored over the general, the language in N.C. Session Law 2009-401 naming petitioner as the only party who may request a jury trial controlled the more general language that the matter shall proceed to trial as any other civil action. **City of Asheville v. Frost, 258.**

WORKERS' COMPENSATION

Workers' Compensation—additional medical treatment claim—time barred —The Industrial Commission did not commit prejudicial error in a workers' compensation case by concluding that a claim for additional medical treatment was time-barred by N.C.G.S. § 97-25.1. The right to medical compensation terminates two years after the employer's last payment of medical or indemnity compensation. **Anders v. Universal Leaf N. Am., 241.**

Workers' Compensation—causation—additional medical and indemnity benefits—failure to give Parsons presumption—The Industrial Commission did not commit prejudicial error in a workers' compensation case by denying plaintiff employee's claims for additional medical and indemnity benefits related to bilateral hernias where they were not causally related to his prior compensable hernia injury. Although the Commission failed to give plaintiff the benefit of the *Parsons* presumption, a reversal on that issue would not change the outcome. **Anders v. Universal Leaf N. Am., 241.**

SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

Opinions will be filed on the first and third Tuesdays of each month.

CAPEN TRUCER CARL ANDERS, II, EMPLOYEE, PLAINTIFF
v.
UNIVERSAL LEAF NORTH AMERICA, EMPLOYER, AND ESIS, CARRIER, DEFENDANTS

No. COA16-910

Filed 2 May 2017

1. Workers' Compensation—additional medical treatment claim —time barred

The Industrial Commission did not commit prejudicial error in a workers' compensation case by concluding that a claim for additional medical treatment was time-barred by N.C.G.S. § 97-25.1. The right to medical compensation terminates two years after the employer's last payment of medical or indemnity compensation.

2. Workers' Compensation—causation—additional medical and indemnity benefits—failure to give Parsons presumption

The Industrial Commission did not commit prejudicial error in a workers' compensation case by denying plaintiff employee's claims for additional medical and indemnity benefits related to bilateral hernias where they were not causally related to his prior compensable hernia injury. Although the Commission failed to give plaintiff the benefit of the *Parsons* presumption, a reversal on that issue would not change the outcome.

Appeal by plaintiff from opinion and award entered 5 July 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 February 2017.

Kellum Law Firm, by J. Kevin Jones, for plaintiff-appellant.

Wilson & Ratledge, PLLC, by James E. R. Ratledge and Scott J. Lasso, for defendants-appellees.

ZACHARY, Judge.

Plaintiff-employee Capen Trucer Carl Anders, II (Anders) appeals from an Opinion and Award of the Industrial Commission denying his claims for additional medical and indemnity benefits related to bilateral hernias allegedly caused by an earlier, compensable hernia injury that plaintiff suffered while employed by defendant-employer Universal Leaf North America (Universal Leaf). Anders' primary argument on appeal is

that the Commission erred in concluding that the subsequent bilateral hernias that Anders suffered after Universal Leaf terminated his employment were not causally related to his prior compensable hernia injury. Anders also challenges the Commission's conclusion that his claim for additional medical treatment related to the subsequent bilateral hernias was time-barred by N.C. Gen. Stat. § 97-25.1. For the reasons that follow, although the Commission committed an error in its causation analysis, we conclude that no remand is necessary in this case, and that the Commission's Opinion and Award should be affirmed.

I. Background

This case arises out of an admittedly compensable bilateral inguinal hernia injury that Anders suffered while employed as a seasonal employee by Universal Leaf. At the time of the work-related accident, which occurred on 20 November 2010, Anders was working on the "blending line" removing wires from bales of tobacco. After a tobacco-bale wire became stuck, Anders "yanked on the wire and felt a pain in his groin." On 22 November 2010, Universal Leaf sent Anders to Carolina Quick Care, where he was diagnosed with an inguinal hernia and referred to a surgeon. However, defendants refused to authorize a surgeon's visit at that time. Anders worked under light-duty restrictions for several days.

On 28 November 2010, Anders sought treatment for his hernia in the emergency department at Halifax Regional Medical Center, where he was again diagnosed with an inguinal hernia and referred to a surgeon. When Anders returned to work on 29 November 2010, he learned that he had been fired for violating Universal Leaf's attendance policy. The record reveals that a specific absentee policy applied to Anders' position and that Universal Leaf had an established process for handling workers' compensation claims. According to Universal Leaf's absentee policy, a seasonal worker could be terminated for accruing six "occurrences"—i.e., "a day out of work, an early leave, or a late entry into work"—in a twelve-month period. Anders had accumulated at least six occurrences between 17 September 2010 and 29 October 2010. When Anders sought medical treatment on 28 November 2010, his absence from work counted as an occurrence because Anders did not contact Universal Leaf's first aid office and receive authorization for the hospital visit.

Shortly after Universal Leaf terminated Anders, he found work at a local Waffle House. On 22 March 2011, Dr. Robert Vire performed a bilateral inguinal repair surgery on Anders. That same day, Anders was discharged from the hospital with the temporary restriction that he not

lift more than 10 pounds. Although Anders returned to Dr. Vire on 7 April 2011 with "soreness" at the incision site, Dr. Vire found no evidence of any hernia. Dr. Vire released Anders to full-duty work and instructed him to report for further treatment as needed. Anders then returned to his position at Waffle House.

In late May 2011, Anders experienced ongoing pain in his right groin and he returned to Dr. Vire, who ordered that Anders undergo an ultrasound and CT scan of the abdomen, pelvis, and chest. The ultrasound was performed on 8 June 2011 and Anders underwent CT scans on 20 June 2011 and 7 July 2011. Dr. Vire found no evidence of a recurring hernia, but the ultrasound revealed that Anders suffered from a "small right hydrocele with superficial edema around the right scrotum." It does not appear that the CT scans revealed any further concerns.

Anders' original claim for workers' compensation benefits related to the work-related hernia was accepted by defendants' filing a Form 60 on 13 May 2011. That same day, defendants also filed a Form 28 Return to Work report, which indicated that Anders was released to work on 15 April 2011,[1] and a Form 28B, which reported that Anders had received medical compensation and 2.2 weeks of temporary total disability benefits for the period from 29 March 2011 until 14 April 2011. The Form 28B established that Anders received his last disability payment on 8 April 2011. Anders received his last medical compensation payment on 19 January 2012; that payment covered the ultrasound and the CT scans ordered by Dr. Vire.

Based on the results from the June 2011 ultrasound, Dr. Vire referred Anders to Dr. Fred Williams, a surgeon at ECU Physicians. Dr. Williams examined Anders on 11 August 2011 and found no recurrent hernias, but Dr. Williams did "appreciate[] a small hydrocele, with tenderness in the . . . ilioinguinal nerve." As a result, Anders was prescribed the medication Neurontin for nerve pain. Anders began working for Hardee's in August 2011.

When Anders sought treatment for bilateral groin pain in May 2013, he was referred to general surgeon Dr. James Ketoff, who diagnosed a small, recurrent right inguinal hernia. Dr. Ketoff surgically repaired this hernia on 6 June 2013, and he ordered Anders out work until 9 July 2013.

---

1. Although the Form 28 indicated that Anders returned to work for Universal Leaf on 15 April 2011, it is clear that Anders returned to work at Waffle House, as Anders was terminated from his employment with Universal Leaf in November 2010.

Between July 2013 and August 2014, Anders sporadically sought medical treatment for groin pain.

On 27 January 2014, Anders initiated the present action by filing a Form 33 request for hearing, seeking medical and indemnity compensation for his recurring hernias. Following defendants' Form 33R response, which asserted that Anders had received all benefits to which he was entitled, the matter was heard before Deputy Commissioner Theresa Stephenson on 10 September 2014. On 9 April 2015, Deputy Commissioner Stephenson filed an Opinion and Award that, *inter alia*, concluded that Anders' subsequent recurring hernias were not related to his November 2010 work-related injury, awarded certain indemnity compensation to Anders, and denied other indemnity compensation and any medical compensation.

Anders reported to Dr. Ketoff, who diagnosed a left-sided, recurrent hernia on 21 August 2014. Dr. Ketoff surgically repaired Anders' left-sided hernia on 24 September 2014. Dr. Ketoff ordered Anders out of work from the date of the surgery until 9 December 2014, when Anders was released to work and instructed to ease into full activity.

Anders appealed Deputy Commissioner Stephenson's decision to the Full Commission. After hearing the matter in September 2015, the Commission entered an Opinion and Award on 5 July 2016 and found, *inter alia*, that Anders' work-related hernia had "fully healed" after it was repaired on 22 March 2011; that defendants' last payments of indemnity and medical payments occurred on 8 April 2011 and 19 January 2012, respectively; that Anders did not request additional medical compensation until 27 January 2014; that Anders had not suffered any permanent damage to any organs or body parts as a result of the work-related injury; and that Anders failed to produce evidence of his earnings from the work he performed after Universal Leaf terminated him, which included positions at Waffle House, Hardee's, and landscaping and construction work.

Based on these findings, the Commission concluded that Anders had failed to prove that his November 2010 work-related injury was causally related to his subsequent recurring hernias, and that Anders' request for additional medical compensation was time-barred by N.C. Gen. Stat. § 97-25.1. Because Anders had failed to prove that he was "disabled" as defined by the Workers' Compensation Act during the period following his termination, the Commission further concluded that Anders was not entitled to additional indemnity compensation for his subsequent recurrent hernias. Consequently, Anders' claims for additional compensation were denied. Anders now appeals the Commission's Opinion and Award.

II. Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). The " 'Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "Thus, if the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's findings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). The Commission's conclusions of law are subject to *de novo* review. *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331, 593 S.E.2d 93, 95 (2004).

III. Discussion

On appeal, Anders' primary argument is that the Commission improperly decided the causation issue. Anders contends that the Commission erred in determining that his subsequent bilateral hernias were not compensable as natural and direct results of the earlier compensable bilateral hernia he suffered while employed by Universal Leaf. However, the Commission's Opinion and Award also contains conclusions of law that present separate and distinct bars—which are unaffected by the causation issue—to Anders' claims for additional medical and indemnity benefits. Accordingly, we begin by addressing the Commission's conclusions that Anders' claim for medical benefits was time-barred, and that his claim for indemnity benefits should be denied because he failed to prove that he was "disabled" as defined by the Workers' Compensation Act during the period following his termination from employment by Universal Leaf.

A. Overview

In 1929, the legislature created our Workers' Compensation Act, "[t]he underlying purpose of [which] is to provide compensation for work[ers] who suffer disability by accident arising out of and in the course of their employment." *Henry v. A.C. Lawrence Leather Co.*, 234 N.C. 126, 127, 66 S.E.2d 693, 694 (1951). As the plan is designed, "[a]n award under the Act has two distinct components: (1) payment of '*medical compensation*' pursuant to G.S. § 97-25 for expenses

incurred as a direct result of the work-related injury, and (2) payment of *general* '*compensation*' pursuant to G.S. §§ 97-29 through 97-31 for financial loss suffered as a direct result of the work-related injury." *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 118, 598 S.E.2d 185, 189 (2004) (emphasis added and citations omitted); *see Cash v. Lincare Holdings*, 181 N.C. App. 259, 264, 639 S.E.2d 9, 14 (2007) (recognizing that "the legislature always has provided for, and continues to provide for, [these] two distinct components of an award under the Workers' Compensation Act") (citation and internal quotation marks omitted).

The term medical compensation is defined as

> medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

N.C. Gen. Stat. § 97-2(19) (2015). In contrast, indemnity benefits (general compensation) may be awarded to address "financial loss other than medical expenses." *Hyler v. GTE Prod. Co.*, 333 N.C. 258, 267, 425 S.E.2d 698, 704 (1993), *superseded in part on other grounds by statute as recognized by Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). Because "the Commission's determination that an employer must pay an injured employee medical compensation pursuant to N.C.G.S. § 97-25 is a separate determination from whether an employer owes [general] compensation as a result of an employee's disability[,] . . . [n]either determination is a necessary prerequisite for the other." *Cash*, 181 N.C. App. at 264, 639 S.E.2d at 14.

With this statutory scheme in mind, we turn to Anders' claim for additional medical compensation.

[1] B. Limitations Period on Anders' Claim for Medical Compensation

As noted above, the Commission concluded that Anders' claim for additional medical compensation for treatment related to his subsequent

recurrent hernias was time-barred pursuant to the provisions of N.C. Gen. Stat. § 97-25.1. The Commission's conclusion cited to this Court's decisions in *Busque v. Mid-Am. Apartment Communities*, 209 N.C. App. 696, 707 S.E.2d 692 (2011) and *Harrison v. Gemma Power Systems, LLC*, 234 N.C. App. 664, 763 S.E.2d 17, 2014 WL 2993853 (2014) (unpublished), and was based on the following findings:

> 15. A Form 28B, *Report of Employer or Carrier/Administrator of Compensation and Medical Compensation Paid and Notice of Right to Additional Medical Compensation*, was filed by Defendants on May 16, 2011, reflecting indemnity compensation payments from March 29, 2011 through April 14, 2011, with the last compensation check forwarded on April 8, 2011.
>
> 16. The Form 28B further reflected that the last payment of medical compensation was paid on May 5, 2011. However, Defendants' claims payment history reflects that the actual last payment by Defendants of medical compensation was made on January 19, 2012, for the ultrasound and CT scans performed in June and July 2011.
>
> . . .
>
> 19. . . . [T]he last payment of medical compensation made by Defendants was January 19, 2012.
>
> 20. Plaintiff did not seek any medical treatment from March 15, 2012 until May 18, 2013. There is no evidence Plaintiff sought authorization for medical treatment from Defendants during this time period. Plaintiff did not file a request to the Commission for additional medical compensation until January 27, 2014, when he filed a Form 33, *Request that Claim be Assigned for Hearing*. This request was made more than two years following the last payment of indemnity and medical compensation.

Section 97-25.1 imposes a limitation period upon an injured employee's right to seek medical compensation:

> The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical

> compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation.

In *Busque*, this Court applied section 97-25.1 in a "straight-forward" manner, holding that the plaintiff's right to medical compensation for an ankle injury was barred because her 2007 application for additional medical treatment was filed more than two years after the defendants' last payment of medical compensation in 2003. 209 N.C. App. at 707, 707 S.E.2d at 700.

Here, the Commission's unchallenged findings establish that Anders' 27 January 2014 request for additional medical compensation was filed more than two years after defendants' last payments of indemnity and medical compensation, which occurred, respectively, on 8 April 2011 and 19 January 2012. Accordingly, the Commission properly concluded that section 97-25.1 stands as a bar to plaintiff's claims for additional medical treatment.

Nevertheless, Anders argues that if the "Commission [had] properly considered the evidence and the law controlling that evidence, there would have been, at minimum, an indemnity award for [the period during which defendant was allegedly disabled], which would in turn render defendants' [section] 97-25.1 defense inapplicable as the indemnity benefits would restart the clock on said statute's limitations period." This argument utilizes the notion of a "hypothetical" indemnity award to prevent section 97-25.1 from barring Anders' claim for additional medical treatment. However, this Court recently rejected a similar contention in *Harrison*.

The *Harrison* Court relied on *Busque* and held that "because the last payment of medical compensation made by [the d]efendant was more than two years prior to [the p]laintiff's current Form 33 filing, . . . [the p]laintiff's right to additional medical compensation [was] time-barred pursuant to N.C. Gen. Stat. § 97-25.1." *Harrison*, 2014 WL 2993853, at *4. Even so, the *Harrison* Court addressed the plaintiff's argument that that " 'the last payment of compensation in the claim has not yet taken place' because '[the p]laintiff is still owed payment for temporary total disability and/or permanent partial impairment.' " *Id.* "Stated differently," the Court explained, "[the p]laintiff argues that the two-year statute of limitations period found in N.C. Gen. Stat. § 97-25.1 has not yet begun and will not begin until [the p]laintiff receives a payment from [the d]efendant for indemnity benefits." *Id.* In rejecting this argument, the Court explained:

> First, [the p]laintiff's argument ignores the plain language of the statute. "The right to medical compensation shall terminate two years after the employer's *last* payment of medical or indemnity compensation. . . ." N.C. Gen. Stat. § 97-25.1 (emphasis added). In context, the word "last" does not refer to a *hypothetical future payment* that [the p]laintiff may be entitled to receive after presenting a claim to the Industrial Commission. On its face, the "last" payment refers to the most recent payment of medical or indemnity benefits that has actually been paid. Second, [the p]laintiff's argument assumes the certainty of a future indemnity payment before the right to such payment has been decided by the Industrial Commission. Third, accepting Plaintiff's interpretation of the statute would allow claimants seeking additional medical compensation to obviate the statute of limitations in any case by asserting a valid claim for indemnity benefits alongside a claim for additional medical compensation. Such an expansive interpretation ignores the clear intent of our legislature to limit claims for additional medical compensation to a specified time period.

Id. (emphasis added). Although clearly not controlling, we find *Harrison*'s reasoning persuasive and apply it to the instant case.

Harrison makes it clear that the "last" payments referred to in section 97-25.1 denote the most recent, "actual" payments of medical or indemnity benefits, not hypothetical payments the Commission *might* award in the future. *Harrison*, 214 WL 2993853, at *4. At the time when the Commission issued its Opinion and Award in the present case, the last *actual* payment of indemnity compensation was made on 8 April 2011. Anders received his last *actual* payment of medical compensation on 19 January 2012. Consequently, defendants had not made any indemnity or medical payments within two years of Anders' request for additional medical compensation, which occurred when Anders filed the Form 33 on 27 January 2014. The evidence, therefore, supports the Commission's findings and the findings support the Commission's conclusion that section 97-25.1 bars Anders' request for additional medical compensation.

C. Indemnity Compensation

[2] Separate from Anders' claim for medical compensation is his claim for indemnity benefits for periods of disability allegedly caused by his

original, compensable hernia injury. "An employee seeking indemnity benefits pursuant to the Workers' Compensation Act has, at the outset, two very general options." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 10, 562 S.E.2d 434, 441 (2002), *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003). First, an injured employee may seek indemnity benefits by showing either a total disability pursuant to N.C. Gen. Stat. § 97-29 (2015) or a partial disability pursuant to N.C. Gen. Stat. § 97-30 (2015). "[D]isability is defined by a diminished capacity to earn wages, not by physical infirmity." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997); N.C. Gen. Stat. § 97-2(9) (2015) ("The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."). "The second option available to an employee seeking indemnity benefits is to show that the employee has a specific physical impairment that falls under the schedule set forth in N.C. Gen. Stat. § 97-31 [(2015)], regardless of whether the employee has, in fact, suffered" a partial or total disability. *Knight*, 149 N.C. App. at 11, 562 S.E.2d at 442.[2] Particularly relevant here, an employee is entitled to compensation under N.C. Gen. Stat. § 97-31(24) if "he [produces] . . . medical evidence that he has loss of or permanent injury to an important external or internal organ or part of his body for which no compensation is payable under any other subdivision of [N.C. Gen. Stat. §] 97-31." *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 142-43, 266 S.E.2d 760, 762 (1980).

1. *Disability Benefits Pursuant to N.C. Gen. Stat. §§ 97-29 and 30*

As to Anders' right to total and temporary disability benefits under sections 97-29 and 97-30 following his termination, Universal Leaf was required to demonstrate initially that: (1) Anders was terminated for misconduct or other fault; (2) a nondisabled employee would have been terminated for the same misconduct or fault; and (3) the termination was unrelated to Anders' compensable injury. *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996).

The Commission addressed the circumstances of Anders' termination in the following unchallenged findings of fact:

> 6. When Plaintiff began working for Defendant-Employer in 2010, he was provided an employee handbook and

2. If an employee is either partially or totally disabled and also has a specific physical impairment that falls under N.C. Gen. Stat. § 97-31, the employee may pursue benefits under the statutory section which affords the most favorable remedy. *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 90, 348 S.E.2d 336, 340 (1986).

> underwent an orientation process. Plaintiff was instructed on how workers' compensation claims would be handled and was instructed on the absentee policy for seasonal employees. Plaintiff was aware of the absentee policy and that, as a seasonal employee, he could be terminated if he accrued six occurrences within a 12-month period.
>
> 7. From September 17, 2010 through October 29, 2010, Plaintiff had missed six work shifts. For three of those shifts, Plaintiff failed to report to work or notify the employer. Plaintiff missed one shift for personal business and the remaining shifts were missed due to illness and occurred prior to his November 20, 2010 incident. Plaintiff received warnings from his supervisor as he accumulated occurrences.
>
> . . .
>
> 34. Based upon a preponderance of the competent, credible evidence, Defendant terminated Plaintiff for misconduct and the reason for Plaintiff's termination was a reason for which a non-disabled employee would be terminated. While Plaintiff's last absence which led to his termination was due to medical treatment he sought for his hernia condition, Plaintiff did not obtain proper authorization for his absence, despite knowledge of the attendance policy, knowledge of the proper procedure for requesting medical treatment and time off for his work-related injury, and knowledge that he had accumulated occurrences and was on warning for his excessive absences.

These unchallenged findings support the Commission's conclusion that defendants met their initial burden of showing that the first three elements of the Seagraves test were satisfied.

"An employer's successful demonstration of . . . evidence [that satisfies the initial part of the *Seagraves* test] is 'deemed to constitute a constructive refusal' by the employee to perform suitable work, a circumstance that would bar benefits for lost earnings, '*unless* the employee is then able to show that his or her inability to find or hold other employment . . . at a wage comparable to that earned prior to the injury[ ] is due to the work-related disability.' " *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 493-94, 597 S.E.2d 695, 699 (2004) (quoting *Seagraves*, 123 N.C. App. at 234, 472 S.E.2d at 401). In other words, "the burden shift[ed] to [Anders] to re-establish that he suffer[ed] from a disability" during

the time periods in question. *Williams v. Pee Dee Electric Membership Corp.*, 130 N.C. App. 298, 303, 502 S.E.2d 645, 648 (1998). An employee must prove all three of the following factual elements in order to support a conclusion of disability:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Therefore, "[t]he burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). As recognized by our Supreme Court in *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 422, 760 S.E.2d 732, 737 (2014), the first two elements announced in *Hilliard* may be proven in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457 (citations omitted). "[A] claimant must also satisfy the third element, as articulated in *Hilliard*, by proving that his inability to obtain equally well-paying work is because of his work-related injury." *Medlin*, 367 N.C. at 422, 760 S.E.2d at 737.

The Commission found the following facts as to whether Anders had satisfied any of *Russell*'s prongs:

> 35. Except for the short period of time following his surgeries, Plaintiff has failed to produce evidence that he was unable to work due to his injuries, that he conducted a

reasonable job search, or that it would have been futile for him to look for work, after November 28, 2010. While Plaintiff returned to work at Waffle House, earning a lower hourly rate than that earned with Defendant-Employer, Plaintiff has failed to produce competent evidence that he earned less than his average weekly wage at any point during his employment with Waffle House or Hardee's. Plaintiff also failed to produce evidence that any partial incapacity to work or any decrease in earnings was a result of his November 20, 2010 injuries and any subsequent physical impairments.

. . .

37. Plaintiff quit his job at Hardee's in October 2011 due to lack of hours. From approximately October 2011 through May 2013, Plaintiff mainly performed landscaping and construction work in the form of framing houses and was paid in cash. Plaintiff did not present evidence of his earnings from his work performed with Waffle House or Hardee's, or his jobs in landscaping and construction.

38. According to his sworn discovery answers served on July 21, 2014, since the date of his injury, Plaintiff sought work at Coca-Cola, Lowe's, Smithfield Genetics, and Georgia Pacific. Plaintiff indicated he also sought work through the Employment Security Commission but did not provide any further details as to the number or types of positions for which he applied.

39. At the evidentiary hearing held on September 10, 2014, Plaintiff presented a one-page job search log detailing contact with various employers from August 2014 through September 2014. Given the manner in which it was completed and Plaintiff's failure to explain the unusual format, it is likely that Plaintiff constructed this sheet at one time rather than over the period of one month as alleged. The timing of this job search documentation is suspect since the calendar for setting the hearing in this matter would have been sent out the first of August, 2014. Plaintiff testified, and there is no evidence to the contrary, that he is physically able to perform all the positions to which he applied.

> 40. Plaintiff has not conducted a reasonable job search. The records do not reflect the types of positions for which Plaintiff applied and whether he met any necessary qualifications for the positions. Furthermore, the evidence reveals Plaintiff contacted approximately 12 employers total over a three-year period in an effort to obtain suitable employment.

These unchallenged findings support the Commission's conclusion that Anders failed to meet his burden of establishing that he was "disabled as defined by the [Workers' Compensation] Act, except for [the] period from March 22, 2011 through April 7, 2011[,]" during which time defendants *did pay* indemnity benefits.

2. *Indemnity Compensation Pursuant to N.C. Gen. Stat. § 97-31(24)*

As to Anders' right to indemnity compensation pursuant to section 97-31(24), the Commission found:

> 28. . . . Dr. Williams testified he treated Plaintiff for nerve-type pain in his right groin and Plaintiff got better. Further, Dr. Williams could not provide the opinion that Plaintiff suffered an injury to a nerve.
>
> . . .
>
> 30. Dr. Ketoff indicated there was no permanent damage to the muscles making up Plaintiffs abdominal muscular floor or to Plaintiff's spermatic blood vessels or cord. Dr. Ketoff opined that the right-sided numbness Plaintiff is experiencing is from the inguinal nerve and is probably permanent. As to the left side, Dr. Ketoff could not provide an opinion on whether Plaintiff would have permanent numbness. Dr. Ketoff did not provide evidence or testimony of the importance of the inguinal nerve to the body's general health and well-being.

These unchallenged findings support the Commission's conclusions that Anders "failed to establish through competent medical evidence that he suffered loss or permanent damage to any important organs or body parts[,] and that it would be "[im]proper to issue an award under N.C. Gen. Stat. § 97-31(24)."

3. *Application*

We are mindful that the Commission's causation analysis, which is discussed in more detail below, was a component of its decision to deny

Anders' claim for additional indemnity compensation. However, as demonstrated in Section III. C. 1. above, Anders failed to produce evidence of how his earning capacity following his termination was impaired in any way. Without establishing wage loss in the first instance, there was no way for Anders to prove that *any* wage loss was connected to the work-related, compensable injury. *See Medlin v. Weaver Cooke Const., LLC*, 229 N.C. App. 393, 396, 748 S.E.2d 343, 346 (2013) ("The purpose of the four-pronged *Russell* test is to provide channels through which an injured employee may demonstrate the required 'link between wage loss and the work-related injury.' ") (citing *Fletcher v. Dana Corp.*, 119 N.C. App. 491, 494-99, 459 S.E.2d 31, 34-36 (1995)), *aff'd*, 367 N.C. 414, 760 S.E.2d 732 (2014). Because this required link was not established, Anders failed to prove that he was partially or totally disabled during the periods for which he seeks compensation. Furthermore, Anders failed to establish that he suffered permanent loss or injury to an important organ or body part. Accordingly, based on the analysis above, and the crucial fact that Anders does not challenge the Commission's findings or conclusions concerning the periods of disability he allegedly suffered as a result of the work-related accident, the Commission's ultimate conclusion that Anders was not "entitled to any additional indemnity compensation under N.C. Gen. Stat. §§ 97-29, 30, or 31" remains undisturbed.

D. The Commission's Causation Analysis and the *Parsons* Presumption

On appeal, Anders' primary arguments are that the facts of *Bondurant v. Estes Express Lines, Inc.*, 167 N.C. App. 259, 606 S.E.2d 345 (2004)[3] are distinguishable from this case, and that the Commission

3. In *Bondurant*, the plaintiff suffered three compensable hernias, two of which were surgically repaired. 167 N.C. App. at 261, 606 S.E.2d at 346-47. The plaintiff later suffered three additional hernias while he was no longer in the employ of the defendant. *Id.* at 261-62, 606 S.E.2d at 347. On appeal to this Court, the plaintiff challenged the Commission's conclusion that his three subsequent hernias were not compensable because they were not causally related to the prior compensable hernias and were therefore governed by the statutory test for the compensability of hernias. *Id.* at 265, 606 S.E.2d at 349; *see* N.C. Gen. Stat. § 97-2(18) (requiring, *inter alia*, that a hernia be the immediate and direct result of a work-related accident or specific traumatic incident of work assigned by the defendant-employer). This Court rejected the plaintiff's argument that the Commission erred by applying the test set out in section 97-2(18) instead of applying the rule recognized in *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 379, 323 S.E.2d 29, 30 (1984) ("When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.") (citation omitted), reasoning that "even if [we] . . . were to conclude that

erred in relying on *Bondurant* to support its conclusion that Anders' subsequent bilateral hernias were not compensable because they were not the direct and natural result of the earlier, compensable hernia that he sustained while employed by Universal Leaf. Anders supplements these arguments with his assertion that the Commission erroneously placed on him the burden of proving that his subsequent recurrent hernias were causally related to his compensable 20 November 2010 injury. According to Anders, the Commission failed to give him the benefit of the evidentiary presumption enunciated in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997).

The Commission found that Dr. Vire "determined that Plaintiff's bilateral hernias caused by the November 22, 2010 [compensable] injury would have been fully healed by May 18, 2013[,]" and that "Dr. Ketoff agreed that the medical records from Dr. Vire and Dr. Williams indicated that Plaintiff has recovered from his March 22, 2011 hernia repairs." Based on these and other findings, and applying "the reasoning in *Bondurant*" and "the statutory test enumerated in [section] 97-2(18)[,]" the Commission concluded that because "[t]he competent, credible evidence establishes that Plaintiff had fully healed from his initial hernia surgery with Dr. Vire [on] March 22, 2011 when he subsequently sustained acute injuries to his bilateral groin in 2013 and 2014," Anders' recurrent hernias were not compensable.

It is well established that an employee who seeks workers' compensation benefits must prove that a causal relationship exists between the injury suffered and the work-related accident. *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010), *disc. review denied*, 365 N.C. 77, 705 S.E.2d 746 (2011). But in *Parsons*, this Court held that where the Commission has determined that an employee has suffered a compensable injury, a rebuttable presumption arises that additional medical treatment is causally related to the original injury. 126 N.C. App. at 542, 485 S.E.2d at 869. In this context, the burden of proof is shifted from the employee to the employer "to prove the original finding of compensable injury is unrelated to [the employee's] present discomfort." *Id.* If the employer, however, "rebuts the *Parsons* presumption, the burden of proof shifts back to the [the employee]." *Miller v. Mission Hosp., Inc.*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014) (citation omitted).

Heatherly controls, plaintiff's argument nevertheless fails as [expert medical testimony established] that just because a person has undergone a hernia repair, it does not necessarily follow that the person will have another hernia." *Bondurant*, 167 N.C. App. at 266, 606 S.E.2d at 350.

In the present case, Anders sought additional medical treatment for recurring hernias allegedly caused by his 2010 work-related injury. By filing a Form 60, defendants admitted the compensability of the 2010 injury. *See Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 136, 620 S.E.2d 288, 293 (2005) (holding that the *Parsons* presumption applies when an employer has admitted compensability of the original injury by filing a Form 60). As a result, the burden had shifted to defendants on the issue of whether Anders was entitled to additional compensation. Deputy Commissioner Stephenson correctly applied the *Parsons* presumption in her Opinion and Award before concluding that defendants had "successfully rebutted Plaintiff's presumption that the recurrent hernias are related to the original compensable hernias." The Commission, however, clearly failed to give Anders the benefit of the *Parsons* presumption.

Ordinarily, the Commission's error would require us to reverse its determination of causation and remand for a new hearing on that issue. *See*, *e.g.*, *King v. Kelly Springfield Tire Co.*, 159 N.C. App. 466, 583 S.E.2d 426 (2003) (remanding for new findings where the Commission failed to place the burden on the defendant to prove that the additional medical treatment sought by the plaintiff was not related to his original compensable injury); *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 260, 523 S.E.2d 720, 724 (1999) ("[T]he Commission['s findings indicate that it] failed to give Plaintiff the benefit of the [*Parsons*] presumption that his medical treatment now sought was causally related to his 1995 compensable injury. . . . Because Plaintiff was entitled to such a presumption, we remand this case to the Commission for a new determination of causation."). But that is not necessary in this case because Anders' claim for medical compensation is barred by the provisions of section 97-25.1, and the Commission's conclusion that Anders is not entitled to any additional indemnity compensation due to his failure to prove that he suffered any period of "disability" following his termination from employment with Universal Leaf remains undisturbed. Accordingly, Anders' claims for medical and indemnity compensation are barred for reasons independent of the causation issue.

IV. Conclusion

Anders' claim for additional medical compensation is barred by the provisions of N.C. Gen. Stat. § 97-25.1. In addition, because Universal Leaf met its initial burden of showing that Anders' termination satisfied the *Seagraves* test, the burden shifted to Anders to prove that he was incapable of earning his pre-injury wages in the same employment or any other employment *and* that the inability to earn such wages was linked to his November 2010, work-related injury. *Hilliard*, 305 N.C. at

595, 290 S.E.2d at 683. Because Anders failed to produce evidence establishing that his pre-injury earning capacity was affected, it is inconsequential whether his subsequent recurring hernias were caused by the original compensable hernia. Although the Commission failed to give Anders the benefit of the *Parsons* presumption, a reversal on that issue would not change the outcome for Anders, so we need not reach this issue or remand for a new causation determination. As a result, the Commission's Opinion and Award is affirmed.

AFFIRMED.

Judges ELMORE and DILLON concur.

THE CITY OF ASHEVILLE, PETITIONER
v.
ROBERT H. FROST, RESPONDENT

No. COA16-577

Filed 2 May 2017

1. Appeal and Error—appealability—interlocutory orders—demand for jury trial

An order denying petitioner's motion to strike respondent's demand for a jury trial was addressed on appeal because it affected a substantial right.

2. Trials—civil—request for jury trial—Asheville Civil Service Board

Only the petitioner, the City of Asheville, had the right to request a jury trial in an appeal from the Asheville Civil Service Board to the Buncombe County Superior Court, and the trial court erred by not dismissing respondent's request for a jury trial. Applying the statutory construction rule that the specific is favored over the general, the language in N.C. Session Law 2009-401 naming petitioner as the only party who may request a jury trial controlled the more general language that the matter shall proceed to trial as any other civil action.

Judge DIETZ concurring.

Judge HUNTER, Jr. dissenting.

Appeal by petitioner from order entered 22 December 2015 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 10 January 2017.

McGuire, Wood & Bissette, P.A., by Sabrina Presnell Rockoff, and Asheville City Attorney Robin Currin, Deputy City Attorney Kelly Whitlook, and Assistant City Attorney John Maddux, for petitioner-appellant.

John C. Hunter for respondent-appellee.

BRYANT, Judge.

Where North Carolina Session Law 2009-401 specifically provides that a petitioner may request a trial by jury and then provides that the matter shall proceed "as any other civil action," the specificity of the session law controls and the trial court erred in denying petitioner's motion to strike respondent's demand for a jury trial.

This matter was first brought before the Civil Service Board of the City of Asheville ("the Civil Service Board") as a quasi-judicial matter on 9 September 2014. The Civil Service Board was tasked with a review of the process by which Senior Police Officer Robert H. Frost had been terminated from employment on 12 March 2014. Officer Frost's termination resulted from an accusation of excessive force.

In an order entered 25 September 2014, the Civil Service Board made findings of fact which indicated that on 2 February 2014, Officer Frost was in uniform, driving a marked police vehicle, working as a patrol officer for the Asheville Police Department when he was "flagged down" by a store clerk for the "Hot Spot" located at 70 Asheland Avenue. The clerk directed Officer Frost's attention to a woman, Amber Banks, who had previously been banned from the store. As Banks was leaving the area, Officer Frost yelled for her to stop and ran to catch up with her as she kept walking away. Officer Frost arrested Banks for trespassing.

As he escorted Banks back toward his vehicle, a struggle ensued. Officer Frost took Banks to the ground with a leg sweep, called for backup, and placed Banks in handcuffs. As they again proceeded toward the police vehicle, it appeared to Officer Frost that Banks was getting ready to kick him. In order to defend himself, he began running with

Banks and then pushed her onto the hood of his police vehicle. On the car hood, Banks rolled over and Officer Frost believed she was attempting to bite him. So, he took her to the pavement, admitting that he lost his grip and that Banks landed harder than he had intended. Banks laid still and quiet on the ground until another officer arrived. Emergency Medical Services also arrived, checked Banks at the scene, and cleared her to go to the detention facility.

The same day of the incident, Officer Frost completed an "Asheville PD Use of Force Report." The report was reviewed by Officer Frost's chain of command, and ultimately, the incident was investigated by the State Bureau of Investigation and Office of Professional Standards. On 14 February 2014, Officer Frost was placed on paid non-disciplinary investigative suspension. Following a 28 February 2014 panel hearing convened upon a supervisor's recommendation of disciplinary action, a recommendation was made that Officer Frost be terminated from employment. On 12 March 2014, Officer Frost was terminated from employment with the City of Asheville Police Department. Officer Frost timely appealed the termination to the Civil Service Board. The Civil Service Board found that termination of Officer Frost was improper and in violation of city policies as Officer Frost was not provided adequate due process protection. Therefore, the Civil Service Board concluded that the City's termination of Officer Frost was not justified, that the termination should be rescinded, and that Officer Frost should be reinstated with back pay and all benefits.

On 3 October 2014, the City of Asheville filed a civil summons and a petition for trial de novo in Buncombe County Superior Court. Shortly thereafter, on the same day, Officer Frost likewise filed with Buncombe County Superior Court a petition for a trial de novo.

In his petition for a trial de novo, Officer Frost requested a trial by jury pursuant to Section 8(g) of the Asheville Civil Service Law. In its petition, the City of Asheville did not request a trial by jury. However, on 12 November 2014, in response to Officer Frost's petition for trial de novo, the City filed an answer, a motion to dismiss, and a motion to strike. The City challenged Officer Frost's standing to appeal, given that the order he attempted to appeal ruled in his favor—that his termination was not justified and he was to be reinstated with full back pay. The City further challenged that due to the City's appeal—filed before Officer Frost's appeal—involving the same parties and relating to the same subject matter, Officer Frost's petition was unlawful and "wholly unnecessary."

Following a hearing in Buncombe County Superior Court, the Honorable Mark E. Powell entered a 25 February 2015 order granting the City's motion to dismiss with prejudice Officer Frost's petition for a de novo trial by jury, as Officer Frost lacked standing and his petition was abated by the doctrine of prior pending action.

On 30 November 2015, a hearing was held on Officer Frost's demand for a jury trial in response to the City of Asheville's petition for a trial de novo, the Honorable William H. Coward, Judge presiding. On 22 December 2015, Judge Coward entered an order noting that the City of Asheville filed a 9 November 2015 motion to strike Officer Frost's demand for a jury trial "on the grounds that the [Asheville Civil Service Law, 1953 N.C. Session Laws Chapter 747, as amended by 2009 N.C. Session Law Chapter 401 ("the Act")] only allows the 'petitioner' to request a jury trial." The court acknowledged the language of the Act, stating "either party may appeal to the Superior Court Division . . . for a trial de novo. . . . If the petitioner desires a trial by jury, the petitioner shall so state. . . . [And] [t]here[after], the matter shall proceed to trial as any other civil action." The court reasoned that because the Act directs "the matter shall proceed . . . as any other civil action," Rule 38 of our Rules of Civil Procedure ("Jury trial of right"), allows Officer Frost, as the respondent, to request a trial by jury. Thus, the trial court denied petitioner City of Asheville's motion to strike respondent Officer Frost's demand for a jury trial. Petitioner City of Asheville appeals.

Interlocutory Appeal

[1] Judgments and orders of the Superior Court are divisible into these two classes: (1) Final judgments; and (2) interlocutory orders. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. Durham, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950) (citations omitted). "An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding[.]" N.C. Gen. Stat. § 1-277(a) (2015). "[A]ppeal lies of right directly to the Court of Appeals . . . (3) [f]rom any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . : a. Affects a substantial right." *Id.* § 7A-27(b)(3)a.

Our Supreme Court has held that a trial court order denying "the defendant's motion that the plaintiffs' demand for a jury trial be invalidated as an interlocutory order which does not affect a substantial right" is properly overruled, as "an order denying a jury trial is appealable, an order requiring a jury trial should be appealable." *Faircloth v. Beard*, 320 N.C. 505, 506–07, 358 S.E.2d 512, 513–14 (1987)[1] (citing *In re McCarroll*, 313 N.C. 315, 327 S.E.2d 880 (1985); *In re Ferguson*, 50 N.C. App. 681, 274 S.E.2d 879 (1981)). *See generally In re Foreclosure of Elkins*, 193 N.C. App. 226, 227, 667 S.E.2d 259, 260 (2008) ("[A]n order denying a motion for a jury trial . . . affects a substantial right."). Therefore, we address this appeal.

Analysis

[2] On appeal, petitioner City of Asheville argues that the trial court erred by denying its motion to strike respondent Officer Frost's demand for a jury trial. The City of Asheville contends that N.C. Session Law 2009-401, governing appeals from the Asheville Civil Service Board, allows only the petitioner to request a jury trial. We agree.

"[W]here an appeal presents a question of statutory interpretation, this Court conducts a *de novo* review of the trial court's conclusions of law." *Ennis v. Henderson*, 176 N.C. App. 762, 764, 627 S.E.2d 324, 325 (2006) (citation omitted).

Pursuant to the North Carolina Constitution, "[t]he General Assembly shall provide for the organization and government . . . and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable." N.C. Const. art. VII, § 1.

> The General Assembly delegates express power to municipalities by adopting an enabling statute . . . .
>
> . . . If the language of [the enabling] statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. A statute clear on its face must be enforced as written.

Quality Built Homes Inc. v. Town of Carthage, ___ N.C. ___, ___, 789 S.E.2d 454, 457 (2016) (alteration in original) (citations omitted).

---

1. *Fairthcloth* was distinguished on other grounds by *Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2d 487 (1989), but as the Court noted, the *Kiser* decision "does not disturb the result in *Faircloth*." *Kiser*, 325 N.C. at 510, 385 S.E.2d at 491.

"We preface our analysis by noting that statutory interpretation begins with the plain meaning of the words of the statute. Where the plain meaning of the statute is clear, no further analysis is required. Where the plain meaning is unclear, legislative intent controls." *Sharpe v. Worland*, 137 N.C. App. 82, 85, 527 S.E.2d 75, 77 (2000) (citations omitted).

"First, it is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] other sections which are general in their application." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 304, 554 S.E.2d 634, 638 (2001) (citations omitted). "In such situation the specially treated situation is regarded as an exception to the general provision." *Utilities Comm'n v. Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citation omitted).

> The rule of statutory construction *ejusdem generis* provides that:
>
> where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.

Knight v. Town of Knightdale, 164 N.C. App. 766, 769, 596 S.E.2d 881, 884 (2004) (quoting *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970)).

North Carolina Session Law 1953-757 established a Civil Service Board as part of the government of the City of Asheville. 1953 N.C. Sess. Law 757 § 1. As amended in 2009 by Session Law 2009-401, entitled "An act to revise the laws relating to the Asheville Civil Service Board," our General Assembly provided the following:

> Within ten days of the receipt of notice of the decision of the Board, *either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial de novo*. The appeal shall be effected by filing with the Clerk of the Superior Court of Buncombe County a petition for trial in superior court, setting out the fact upon which the petitioner relies for relief. *If the petitioner desires a trial by jury, the petition shall so state. . . .* Therefore, the matter shall proceed to trial as any other civil action.

2009 N.C. Sess. Laws 401 § 7(g) (emphasis added). While "either party may appeal . . . for a trial de novo," the session law names the petitioner as the party to designate whether a trial by jury is desired. *Id.* However, the superior court in its 22 December 2015 order and respondent Officer Frost in his argument before this Court contend that the last sentence of the session law, "[t]here[after], the matter shall proceed to trial as any other civil action," gives rise to a respondent's right to request a trial by jury.[2]

Respondent argues that "proceed[ing] to trial as any other civil action" invokes our Rules of Civil Procedure, specifically Rule 38, "Jury trial by right." Per Rule 38, "[a]ny party may demand a trial by jury of any issue triable of right by a jury . . . ." N.C. Gen. Stat. § 1A-1, Rule 38(b) (2015). And thus, respondent Officer Frost, as a party to a civil action filed in Buncombe County Superior Court may demand a trial by jury on the issues appealed from the Civil Service Board. For the following reasons, we disagree with respondent's argument.

"The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citation omitted). Where one rule is more specific in describing the rights afforded a party in action than another rule, we are guided by the construction "that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] other sections which are general in their application." *Westminster Homes, Inc.*, 354 N.C. at 304, 554 S.E.2d at 638 (citation omitted). Moreover, "it is a fundamental principle of statutory interpretation that courts should evaluate [a] statute as a whole and . . . not construe an individual section in a manner that renders another provision of the same statute meaningless." *Lunsford*, 367 N.C. at 628, 766 S.E.2d at 304 (alteration in original) (citation omitted).

Session Law 2009-401 specifically provides for appeals to Buncombe County Superior Court from orders entered by the Asheville Civil Service Board and states that either party may appeal the decision of the Civil Service Board. But the session law designates only the petitioner as a party who may request a jury trial. This designation, that a petitioner may request a jury trial in appeals from decisions of the Civil Service Board to the Buncombe County Superior Court, is more specific than the right more generally conferred in Civil Procedure Rule 38, allowing

2. We note that Officer Frost did not appeal from the 25 February 2015 order of Judge Powell granting the City's motion to dismiss with prejudice Officer Frost's petition for a trial by jury.

any party to a civil action to demand a jury trial. Thus, pursuant to the construction favoring the rule tailored to a specific circumstance as controlling over a more generally applicable rule, the language of Session Law 2009-401 naming only the petitioner as the party who may request a jury trial is controlling over the more generally applicable right of any party to demand a jury trial, as provided in Civil Procedure Rule 38. *See Westminster Homes, Inc.*, 354 N.C. at 304, 554 S.E.2d at 638. Moreover, to read Session Law 2009-401's language that "the matter shall proceed to trial as any other civil action" as an incorporation of the Rules of Civil Procedure, including the right of any party to demand a jury trial, would render the language designating only the petitioner as the party who may request a jury trial meaningless. This, too, violates our rules of statutory interpretation. *See Lunsford*, 367 N.C. at 628, 766 S.E.2d at 304. Therefore, based on our well-established rules of statutory construction, only petitioner City of Asheville had the right to request a jury trial. Accordingly, we hold the trial court erred in failing to dismiss respondent Officer Frost's request for a jury trial, and the trial court's 22 December 2015 order is

REVERSED.

Judge DIETZ concurs in a separate opinion.

Judge HUNTER, Jr., dissents in a separate opinion.

DIETZ, Judge, concurring.

The dissent's reasoning demonstrates that this is a difficult case with issues about which reasonable jurists can disagree. I write separately to highlight what are, in my view, three key reasons why the dissent is unpersuasive.

First, the fact that Rule 38 of the Rules of Civil Procedure applies to the trial court's review below (and I agree that it does), says nothing of whether Frost, as the respondent, has a right to a jury trial. Rule 38 does not create a substantive right to a jury trial—it merely creates the procedure to request a jury trial where there is a right to one. N.C. Gen. Stat. § 1A-1, Rule 38(a), (b). Were it otherwise, there would be a right to a jury trial in every civil action; there is not. *See Kiser v. Kiser*, 325 N.C. 502, 508, 385 S.E.2d 487, 490 (1989).

Instead, the right to a jury trial in a civil action is conferred in one of two ways: by statute or by our State constitution. A statutory right

to a jury trial exists if the right is conferred "in the express language of the statute itself." *Id.* at 509, 385 S.E.2d at 490. A constitutional right to a jury trial exists if the right "existed by statute or at common law at the time the Constitution of 1868 was adopted." *Id.* at 507, 385 S.E.2d at 490.

Neither means of conveying a right to jury trial is present here. As explained in the majority opinion, the express language of the statute only confers a right to jury trial on the petitioner, not the respondent. And this Civil Service Act claim, like the claim for equitable distribution in *Kiser*, "did not exist prior to 1868, but was newly created by the General Assembly"—in this case, by the Civil Service Act of 1953. *Id.* at 508, 385 S.E.2d at 490. Thus, the respondent in these Civil Service Act proceedings does not have a right to demand a jury trial.

Second, I do not agree that the majority opinion reads the term "only" into the statute where it does not exist. The statute says "either party may appeal," "[t]he appeal shall be effected by filing . . . a petition for trial in superior court," and "[i]f the petitioner desires a trial by jury, the petition shall so state." 2009 N.C. Sess. Laws ch. 401, § 7. Thus, the reason that only the petitioner may request a jury trial is not because this Court inserted the word "only" into the text, but because the statute's plain language only gives that right to the petitioner, not the respondent.

Third, while I acknowledge that we must interpret statutes in a manner that avoids absurd results, the majority's interpretation does not lead to absurd results. The absurdity canon applies "[w]here the plain language of the statute would lead to patently absurd consequences" that the legislature "could not *possibly* have intended." Pub. *Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470, (1989) (Kennedy, J., concurring). Permitting only the losing side to request a jury trial in an administrative proceeding is unusual, but it is something the General Assembly certainly *could* have intended. Thus, I do not believe we can invoke the absurdity canon to ignore the statute's plain language in this case.

HUNTER, JR., Robert N., Judge, dissenting.

The majority concludes North Carolina Session Law 2009-401 allows for a petitioner, and only a petitioner, seeking a trial de novo, the right to a trial by jury. Under the majority's construction, the option to request a trial by jury is a unilateral right extended only to one party. Because the majority's textual construction resolves a statutory ambiguity in a manner which misapplied the cannons of statutory construction achieves an "absurd" result, I respectfully dissent.

This case concerns an ambiguity created by the Asheville's Civil Service Act. The ambiguity is whether the statute grants a right to have facts determined by a jury to only the party whom petitions for judicial review from a ruling by the Asheville Civil Service Board or whether that right is also given to the respondent or the other party whom may also cross petition from a ruling.

The General Assembly first codified Asheville's Civil Service Act ("the Act") in 1953. The Act's purpose was to protect the City of Asheville's employees. *City of Asheville v. Aly*, 233 N.C. App. 620, 623, 757 S.E.2d 494, 498 (2014). The Act established the Asheville Civil Service Board ("the Board") and charged it with the "duty to make rules for 'the appointment, promotion, transfer, layoff, reinstatement, suspension and removal of employees in the qualified service.' " *Id.* at 623, 757 S.E.2d at 498 (quoting 1953 N.C. Sess. Laws ch. 757, § 4). Although the Act did not provide a mechanism for judicial review of the Board's determinations, our Supreme Court concluded a discharged City employee could petition a trial court to review the Board's decision:

> [i]n view of the provisions of the statute creating the Civil Service Board of the City of Asheville, and the procedure outlined in Section 14 thereof, we hold that a hearing pursuant to the provisions of the Act with respect to the discharge of a classified employee of the City of Asheville by said Civil Service Board, is a quasi-judicial function and is reviewable upon a writ of certiorari issued from the Superior Court.

Id. at 623, 757 S.E.2d at 498 (quoting *In re Burris*, 261 N.C. 450, 453, 135 S.E.2d 27, 30 (1964)).

In 1977, our Legislature codified a party's right to a judicial review of the Board's decision by enacting the following provision which is at issue on this appeal:

> Within ten days of the receipt of notice of the decision of the Board, *either party* may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial *de novo*. The appeal shall be effected by filing with the Clerk of the Superior Court of Buncombe County a petition for trial in superior court, setting out the fact[s] upon which the petitioner relies for relief. If the *petitioner* desires a trial by jury, the petition shall so state. Upon the filing of the petition, the Clerk of the Superior Court shall issue a civil summons as in [a] *regular civil*

> *action*, and the sheriff of Buncombe County shall serve the summons and petition on all parties who did not join in the petition for trial. . . . Therefore, the matter shall proceed to trial as any other *civil action*.

2009 N.C. Sess. Laws 401 § 7 (emphasis added).

This Court interpreted the scope of a *de novo* appeal to the Buncombe County Superior Court from a decision by the Board upholding the discharge of an Asheville City police officer. *Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E.2d 859 (1985). In *Warren*, this Court concluded a *de novo* appeal to the trial court "vests a court with full power to determine the issues and rights of all parties involved, *and to try the case as if the suit had been filed originally in that court*." *Id.* at 405, 328 S.E.2d at 862 (quoting *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964)) (emphasis added).

"When construing a statute, 'we are guided by the primary rule of construction that the intent of the legislature controls.' " *Woodlief v. N.C. State Bd. Of Dental Examiners*, 104 N.C. App. 52, 58, 407 S.E.2d 596, 600 (1991) (quoting *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978)). Here, the Act's purpose is to ensure Asheville City employees receive fair treatment in all aspects of their employment, including discharge. This purpose is even clearer following the Legislature's codification of the mechanism allowing for a trial court's review of the Board's decision. Furthermore, this Court has ruled a trial court's *de novo* review following the Board's decision is a full trial proceeding. *See Warren* at 405-06, 328 S.E.2d at 862. In light of this, I cannot see how the Act or the Legislature ever contemplated, much less intended, for only one party to an appeal from the Board's decision to have the right to a jury trial.

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Walters v. Cooper*, 226 N.C. App. 166, 169, 739 S.E.2d 185, 187 (2013) (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)). "When a literal interpretation of statutory language yields absurd results, however, or contravenes clearly expressed legislative intent, 'the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.' " *AVCO Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)). "We also assume that the legislature acted with full knowledge of prior and existing law in drafting any particular statute." *Walters* at 169, 739 S.E.2d 185, 187 (citation omitted).

In concluding only a petitioner may request a jury trial, it seems the majority fails to consider the provision in its entirety. The majority instead focuses on the single statutory phrase, "if the petitioner desires a trial by jury, the petition shall so state." In interpreting that language, the majority neglects to consider the legislature couched that phrase between the opening words "either party" and the closing sentence, "[t]herefore, the matter shall proceed to trial as any other civil action." This final sentence, and especially the term "civil action," directs the reader to Rule 38 of the North Carolina Rules of Civil Procedure: "*[a]ny party* may demand a trial by jury of any issue triable of right by a jury." N.C. Gen. Stat. § 1A-1, Rule 38(b) (2016) (emphasis added).

Here, it naturally and logically follows our Rules of Civil Procedure apply. Our Legislature expressly provided "either party" has the right to request a trial *de novo*. Our Legislature further provided this trial *de novo* to proceed as "any other civil action." Therefore, the invocation of Rule 38 indicates all the consequences of designating this mechanism for judicial review a "civil action" are in effect here: especially the fundamental right to a trial by jury.

The statutory phrase at the cornerstone of the majority's decision simply serves as the mechanism for a petitioner to request a jury trial in an appeal from the Board's decision. If the Legislature intended for this provision to mean only a petitioner may ask for a jury trial, the Legislature would have stated its intention by including the word "only." Rather, the Legislature omitted the term "only" and instead provided for "either party['s]" appeal to Superior Court to proceed as "any other civil action." I cannot contemplate another civil action in this State which allows for only one party to designate whether a trial includes a jury.

In concluding only a Petitioner has a right to a jury trial, the majority's construction superimposes the term "only." Their view is the Legislature intended for only one party, the petitioning party in the proceeding below, to have the right to a jury trial. It does not account for the situation where both parties petition for review. This leads to the illogical result in violation of the cannon of statutory construction prohibiting an interpretation that leads to an absurd result. *AVCO Financial Services* at 343, 312 S.E.2d at 708. At best, this interpretation results in a race between the City and the discharged employee to first appeal the Board's decision[1]. At worst, this interpretation creates an incentive for a party to lose its proceeding in front of the Board. In order for a party to

1. In fact, this is exactly what happened. Frost filed his petition for a trial *de novo* approximately 45 minutes after the City of Asheville filed its petition.

qualify as a petitioner, and have the right to a jury trial, a party must first lose before the Board.

Mindful of the Act's purpose to protect discharged City employees, and the reasoning behind the Legislature's subsequent codification of section 7, I conclude either a petitioner or a respondent has a right to a jury trial following the Board's determination. I would therefore affirm the trial court's order denying Petitioner's motion to strike Respondent Frost's demand for a jury trial.

RANDALL COLE, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA16-340

Filed 2 May 2017

1. Administrative Law—contested case—Office of Administrative Hearings—voluntary dismissal—state employee—wrongful termination

The trial court did not err in a wrongful termination case by a state employee by denying respondent N.C. Department of Public Safety's motion to dismiss the employee's second contested case petition. N.C.G.S. § 1A-1, Rule 41(a)(1) applies to contested cases before the Office of Administrative Hearings, and a petition for a contested case hearing may be voluntarily dismissed and refiled within one year.

2. Public Officers and Employees—state employee—just cause for dismissal—unsatisfactory job performance

The administrative law judge erred by reversing a state employee's termination from his position as a laundry plant manager based on unsatisfactory job performance. The requirements of the North Carolina Human Resources Act under 25 NCAC 01J .0605(b) were met and respondent had just cause to dismiss petitioner based on his failure to become certified as a Laundry Manager and his failure to reconcile receipts and send information and invoices to a central office.

Appeal by Respondent from final decision entered 9 February 2016 by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 17 October 2016.

John C. Hunter for Petitioner.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for Respondent.

McGEE, Chief Judge.

The North Carolina Department of Public Safety ("Respondent") appeals from a final decision of the Office of Administrative Hearings ("OAH") concluding as a matter of law that Respondent lacked just cause to dismiss Randall Cole ("Petitioner") from his position as a laundry plant manager, and ordering that he be retroactively reinstated but demoted. We conclude Respondent had just cause to dismiss Petitioner and, therefore, reverse the final decision of OAH.

I. Background

Petitioner worked for Respondent as an assistant director of the Craggy Laundry facility from November 2003 until his promotion to the position of plant manager in December 2010. Upon his promotion to plant manager, a change of command audit ("the audit") was performed by Respondent. The audit is performed each time a new plant manager is hired, and serves as a "report of the condition of that particular facility under the prior management." The audit revealed that improvement was needed in some areas of the laundry facility, and "significant improvement" was needed in others. Petitioner's direct supervisor, Ronald Young ("Young"), discussed the results of the audit with Petitioner at a 3 February 2011 meeting. Due to the magnitude of the problems, "Petitioner was told that a follow-up audit would be conducted to verify corrective action was implemented."

Young sent an email to Petitioner on 1 March 2011 reminding him that the problems that were found in the audit needed to be rectified. Although the problems had not been corrected by that time, Petitioner responded to Young and indicated that all of the issues had been corrected. The promised follow-up audit was conducted on 7 June 2011, and found that some of the issues identified in the audit had not been corrected. Due to these deficiencies, an unsatisfactory rating was entered into Petitioner's employee appraisal, known as the appraisal process ("TAP") for July 2011. An "employee action plan" was issued to Petitioner on 24 August 2011, that directed him to correct "all violations set forth in [the audit]."

Sometime in November 2011, Young documented in Petitioner's TAP that Petitioner had abated all of the audit violations identified in the 24 August 2011 employee action plan. The TAP stated in the "performance log" that "[a]ll violations noted in [the audit] have abated." Despite this notation in Petitioner's TAP, Petitioner in fact had not abated all of the issues in the audit, and was issued a written warning for unsatisfactory job performance on 15 December 2011 (the "first written warning") for "not satisfactorily implementing or correcting actions prescribed on [the] action plan" issued 24 August 2011. The first written warning alerted Petitioner that he might "be subject to further discipline up to and including dismissal" if the problems were not corrected.

As a part of Petitioner's promotion to plant manager, Petitioner was required to become certified as a Laundry Manager under the Association of Linen Management Program. Petitioner was aware of this requirement, and the requirement was documented in his work plans in 2010, 2011, and 2012. Petitioner was also issued an action plan on 21 December 2012 that gave him until 31 January 2013 to obtain the certification. Despite the deadline being extended at least twice, Petitioner failed to obtain the required certification, and was issued another written warning on 20 March 2013 (the "second written warning").[1] The second written warning notified Petitioner that if he failed to achieve his certification by 20 April 2013,[2] he would "receive further disciplinary action up to and including dismissal."

As a part of Petitioner's job responsibilities as plant manager, he was required to reconcile receipts and send the information and invoices to a central office in Raleigh for payment. Petitioner was not fulfilling this job requirement and, in July 2013, Young reached out to Petitioner to inquire why the receipts and invoices were not being properly forwarded. Petitioner told Young that he would complete this task; however, he never did. As a result, Petitioner received a written warning for unsatisfactory job performance related to his failure to perform this task, as well as his failure to correct issues found in an audit conducted

---

1. The second written warning was issued for "grossly inefficient job performance" rather than unsatisfactory job performance. While Petitioner's conduct that led to the second written warning did not constitute grossly inefficient job performance, as the ALJ noted, "no disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly." 25 NCAC 01J .0604(c). Like theALJ, we treat the second written warning as an instance of unsatisfactory job performance.

2. Petitioner did, eventually, receive the certification, but did so by July 2013, months after the 20 April 2013 deadline had passed.

15 August 2013 (the "third written warning"). The third written warning advised Petitioner that he was expected to take "immediate corrective measures" or be subjected to "further disciplinary action up to and including dismissal." Shortly after the third written warning was issued, a semi-annual safety inspection of the Craggy Laundry Facility was conducted and several violations were found, including failures to maintain safety reports and properly train staff on safety programs.

Karen Brown, the Director of Correction Enterprises and Young's direct supervisor, "felt disciplinary action was warranted because of Plaintiff's continued unsatisfactory job performance," and a pre-disciplinary conference was held with Petitioner. Following this conference, Petitioner was dismissed from his position for unsatisfactory job performance. Following his dismissal, Petitioner utilized Respondent's internal appeal procedure, and a final agency decision affirmed his dismissal. Petitioner filed a petition for a contested case hearing with OAH on 3 April 2014, alleging he was dismissed from his position of employment without just cause. Petitioner voluntarily dismissed his petition 144 days later, on 25 August 2014. More than eleven months later, on 12 August 2015, Petitioner filed a second petition for a contested case hearing.

Respondent filed a motion to dismiss the second petition, arguing that N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) is inapplicable to OAH proceedings and, therefore, a petition for a contested case hearing may not be voluntarily dismissed and refiled within one year. The Administrative Law Judge ("ALJ") assigned to the case ruled that "Rule 41 of the N.C. Rules of Civil Procedure applies to contested cases heard by [OAH]," and denied Respondent's motion. The ALJ held a hearing on the merits of Petitioner's claims. Following that hearing, the ALJ issued a final decision concluding as a matter of law that "[a]lthough just cause existed for terminating Petitioner, Respondent failed to meet its burden of proof that it did not act erroneously or fail to use proper procedure" in terminating Petitioner from his employment "because Petitioner did not have two active warnings at the time he was disciplined and terminated." According to the final decision, Respondent lacked just cause to terminate Petitioner but had "sufficiently proven that it had just cause to demote Petitioner based on his unsatisfactory job performance." Therefore, the ALJ ordered Petitioner retroactively reinstated but demoted to the position of assistant manager. Respondent appeals.

II. Analysis

Respondent argues the ALJ erred by: (1) denying Respondent's motion to dismiss and concluding that N.C.G.S. § 1A-1, Rule 41(a)(1)

applies to proceedings before OAH; (2) entering several findings of fact that were not supported by substantial evidence in the record; (3) concluding that Respondent lacked just cause to dismiss Petitioner for unsatisfactory job performance; and (4) imposing a lesser form of discipline rather than remanding the case to the employing agency to impose a new form of discipline.

A. Applicability of N.C.G.S. § 1A-1, Rule 41(a)(1) to OAH Proceedings

[1] Respondent first argues the trial court erred in denying its motion to dismiss Petitioner's second contested case petition. We review this argument *de novo*. *Dion v. Batten*, ___ N.C. App. ___, ___, 790 S.E.2d 844, 851 (2016) (noting that this Court reviews issues of statutory interpretation *de novo*). Respondent contends that N.C.G.S. § 1A-1, Rule 41(a)(1), that permits a voluntarily dismissed claim to be refiled within one year of such dismissal, does not apply to cases before OAH. We disagree. N.C.G.S. § 1A-1, Rule 41(a)(1) provides, in relevant part:

> Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case[.] . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice[.] . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2015). We begin with the assumption that the Rules of Civil Procedure apply to contested case hearings as they do in the trial courts, unless a statute or administrative rule dictates otherwise: "The Rules of Civil Procedure as contained in G.S. 1A-1 . . . *shall apply* in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise." 26 NCAC 03 .0101(a) (2015) (emphasis added). Cases from this Court have interpreted N.C.G.S. § 1A-1, Rule 41(b) as applying to contested case hearings before OAH. *See Scott v. N.C. Dep't of Crime Control & Pub. Safety*, 222 N.C. App. 125, 730 S.E.2d 806 (2012); *Lincoln v. N.C. Dep't of Health & Human Servs.*, 172 N.C. App 567, 616 S.E.2d 622 (2005).

Respondent contends that N.C.G.S. § 1A-1, Rule 41(a)(1) is inapplicable to contested case proceedings because it permits "an action" to be dismissed and refiled by a plaintiff within one year. Since a contested case petition is not "an action" as defined in our General Statutes,[3] Respondent reasons, N.C.G.S. § 1A-1, Rule 41(a)(1) cannot apply to contested case hearings. This assertion directly contradicts both *Scott* and *Lincoln*, each of which applied N.C. Gen. Stat. § 1A-1, Rule 41(b) to contested case hearings despite that portion of the rule also referring to the dismissal of "an action." *Scott*, 222 N.C. App. at 131 n.7, 730 S.E.2d at 810 n.7; *Lincoln*, 172 N.C. App. at 572-73, 616 S.E.2d at 626.

Our General Assembly has empowered OAH with "such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which" OAH was created and, by statute, allowed the Chief Administrative Law Judge of OAH to "adopt rules to implement the conferred powers and duties." N.C. Gen. Stat. §§ 7A-750, 7A-751(a) (2015). Under this authority, OAH promulgated 26 NCAC 03 .0101(a), which provides that the rules of civil procedure, including N.C.G.S. § 1A-1, Rule 41(a)(1) "shall apply" in contested cases in the Office of Administrative Hearings "unless another specific statute or rule provides otherwise." 26 NCAC 03 .0101(a). Respondent's interpretation would render any rule of civil procedure that refers to "an action" as inapplicable to contested case hearings before OAH, which uses the term "contested case." Given 26 NCAC 03 .0101(a)'s expansive command that the rules of civil procedure "shall apply" in contested case proceedings unless another rule or statute directs otherwise, and previous interpretation of N.C.G.S. § 1A-1, Rule 41(b) in *Scott* and *Lincoln*, we reject Respondent's reading of N.C.G.S. § 1A-1, Rule 41(a)(1).

Respondent also contends that N.C. Gen. Stat. § 126-34.02 mandates OAH issue a final decision within 180 days "from the commencement of the case" and thereby renders Rule 41(a)(1) inapplicable. We disagree. N.C.G.S. § 126-34.02, as relevant to this argument, provides:

> Once a final agency decision has been issued in accordance with G.S. 126-34.01, an applicant for State employment, a State employee, or former State employee may file a contested case in the Office of Administrative Hearings

3. N.C. Gen. Stat. § 1-2 provides: "An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense."

> under Article 3 of Chapter 150B of the General Statutes. The contested case must be filed within 30 days of receipt of the final agency decision. Except for cases of extraordinary cause shown, the Office of Administrative Hearings shall hear and issue a final decision in accordance with G.S. 150B-34 within 180 days from the commencement of the case.

N.C. Gen. Stat. § 126-34.02(a) (2015). The 180-day mandate in N.C.G.S. § 126-34.02 does not conflict with a petitioner's ability to voluntarily dismiss a case and refile it within one year as permitted by N.C.G.S. § 1A-1, Rule 41(a)(1). Our Supreme Court has held that "[t]he effect of a judgment of voluntary dismissal [pursuant to N.C.G.S. § 1A-1, Rule 41(a)] is to leave the plaintiff exactly where he or she was before the action was commenced." *Brisson v. Santoriello*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (citations, quotation marks, and brackets omitted). "If the action was originally commenced within the period of the applicable statute of limitations, it may be recommenced within one year after the dismissal, even though the base period may have expired in the interim." *Id.* at 394, 528 S.E.2d at 571 (citations omitted).

Once a voluntary dismissal has been taken pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1), the petitioner has "terminated the action, leaving nothing in dispute[.]" *Teague v. Randolph Surgical Assocs., P.A.*, 129 N.C. App. 766, 773, 501 S.E.2d 382, 387 (1998). In the present case, the original action was commenced on 3 April 2014 when Petitioner filed a petition for contested case hearing. The petition was filed by Petitioner within thirty days of his receipt of the final agency decision in accordance with N.C.G.S. § 126-34.02. Before any decision was reached by OAH, Petitioner dismissed his claim without prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1). At that time, the original contested case petition had been "terminated," leaving nothing in dispute and nothing for OAH to rule on within 180 days. *See Brisson*, 351 N.C. at 593, 528 S.E.2d at 570 (noting that "[a] Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except" pursuant to Rule 41(d) in instances not relevant here). Petitioner's voluntary dismissal left him "exactly where he . . . was before [the contested case petition] was commenced," and allowed Petitioner to recommence his case "within one year after the dismissal, even though the base period . . . expired in the interim." *Id.* (citations omitted).

Pursuant to 26 NCAC 03 .0101(a), the North Carolina Rules of Civil Procedure "shall apply" in contested cases before OAH unless a "specific" statute or regulation provides otherwise. In the present case,

having found no specific statute or rule that provides to the contrary, we hold N.C.G.S. § 1A-1, Rule 41(a)(1) applies to contested cases before OAH, and the ALJ therefore properly denied Respondent's motion to dismiss.

B. Challenged Findings of Fact

Respondent challenges findings of fact 6, 25, 27, 36, 39, and 41 made by the ALJ. All findings of fact that are not challenged are deemed to be conclusively established on appeal. *Blackburn*, ___ N.C. App. at ___, 784 S.E.2d at 519 (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). After carefully reviewing the record and the ALJ's final decision, we conclude that the challenged findings are either not material to our decision in this case, or are more properly labeled conclusions of law. The unchallenged findings are sufficient to show that Respondent had just cause to dismiss Petitioner for unsatisfactory job performance. *See Blackburn*, ___ N.C. App. ___, 784 S.E.2d at 519 (concluding that "it is not necessary for us to assess the evidentiary support for all of the findings challenged by" the appealing party). Therefore, we examine whether the unchallenged findings of fact supported Respondent's dismissal of Petitioner.

C. Just Cause to Dismiss Petitioner for Unsatisfactory Job Performance

[2] Respondent argues the ALJ erred in concluding it lacked just cause to terminate Petitioner for unsatisfactory job performance. Respondent also contends that all of Petitioner's written warnings were "active" at the time of Petitioner's termination and, in the alternative, the plain language of 25 NCAC 01J .0605(b) does not mandate that the prior disciplinary actions be "active" to count toward the number needed before dismissal is permitted under the North Carolina Administrative Code ("the Administrative Code"). We review *de novo* whether just cause existed for Petitioner's termination. *See N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 666-67, 599 S.E.2d 888, 898 (2004).

A career state employee subject to the North Carolina Human Resources Act may only be "discharged, suspended, or demoted for disciplinary reasons" upon a showing of "just cause." N.C. Gen. Stat. § 126-35(a) (2015). Pursuant to the Administrative Code, "just cause" for the dismissal, suspension, or demotion of a career state employee may be established only on a showing of "unsatisfactory job performance, including grossly inefficient job performance," or "unacceptable personal conduct." 25 NCAC 01J .0604 (2015).

Unsatisfactory job performance is defined as "work-related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency." 25 NCAC 01J .0614(9) (2015). The Administrative Code sets out the requirements for a career state employee to be dismissed for unsatisfactory job performance:

> In order to be dismissed for a current incident of unsatisfactory job performance an employee must first receive at least two prior disciplinary actions: First, one or more written warnings followed by a warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal.

25 NCAC 01J .0605(b) (2015). "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citation omitted). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted); s*ee also State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) ("It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise." (citation omitted)).

We are cognizant that this case requires us to interpret the meaning of an administrative regulation, not a statute. However, "[o]ur Supreme Court has applied the rules of statutory construction to administrative regulations as well as statutes." *Kyle v. Holston Group*, 188 N.C. App. 686, 692, 656 S.E.2d 667, 672 (2008) (citations omitted). Therefore, we employ the above rules of statutory construction to the administrative regulation at issue.

Considering and applying the plain and unambiguous text of 25 NCAC 01J .0605(b) appears to present a straightforward answer to this case. The Administrative Code provision requires that, in order to be dismissed for a current incident of unsatisfactory job performance, an employee must have received two prior disciplinary actions, including a written warning and a warning or notification that failure to make the required improvements may result in dismissal. *See* 25 NCAC 01J .0605(b). In the present case, Petitioner received his first written warning on 15 December 2011, and a second written warning on 20 March

2013. Both written warnings advised Petitioner that failure to make the required performance improvements – correcting the problems found in the audit and receiving a laundry manager certification, respectively – might result in further disciplinary action, including his dismissal.

Petitioner then received a third written warning on 24 September 2013, because he failed to correct deficiencies found in the 15 August 2013 audit. The third written warning, like the first and second, warned Petitioner that "if his [u]nsatisfactory [j]ob [p]erformance continued, it might result in further disciplinary action up to and including dismissal[.]" Petitioner was ultimately terminated due to his failure to correct the deficiencies found in the third written warning, which served as the "current incident of unsatisfactory job performance." 25 NCAC 01J .0605(b). Therefore, the requirements of 25 NCAC 01J .0605(b) were met, and Respondent had just cause to terminate Petitioner for unacceptable personal conduct.

Petitioner maintained, and the ALJ ultimately concluded, that this application of 25 NCAC 01J .0605(b) to the facts of the present case was complicated by the existence of 25 NCAC 01J .0614(6). Found in the definitional section of the relevant subchapter of the administrative code, 25 NCAC 01J .0614(6) provides:

> *As used in this Subchapter:*
>
> . . . .
>
> (6) Inactive Disciplinary Action means any disciplinary action issued after October 1, 1995 is deemed inactive for the purpose of this Section if:
>
> (a) the manager or supervisor notes in the employee's personnel file that the reason for the disciplinary action has been resolved or corrected;
>
> (b) the purpose for a performance-based disciplinary action has been achieved, as evidenced by a summary performance rating of level 3 (Good) or other official designation of performance at an acceptable level or better and at least a level 3 or better in the performance area cited in the warning or disciplinary action, following the disciplinary warning or action; or
>
> (c) 18 months have passed since the warning or disciplinary action, the employee does not have

> another active warning or disciplinary action which occurred within the last 18 months.

25 NCAC 01J .0604(6) (2015) (emphases added). The ALJ concluded as a matter of law that, because the definitional section defined "inactive disciplinary action," it is "only logical" that the two prior disciplinary actions required by 25 NCAC 01J .0605(b) must be active. "To hold to the contrary," the ALJ concluded, "means the entire process of finding a prior discipline inactive has no applicability or effect; i.e., a meaningless exercise in futility."[4]

We cannot subscribe to this reading of 25 NCAC 01J .0604(6)'s effect on 25 NCAC 01J .0605(b). By its terms, 25 NCAC 01J .0604(6) states that the definition of "Inactive Disciplinary Action" is operable only "[a]s used in" Subchapter J of Title 25 of the North Carolina Administrative Code. 25 NCAC 01J .0604(6) does not mandate that courts and ALJs make a finding that a prior disciplinary action is inactive, but only instructs that when the term "inactive disciplinary action" is used in Subchapter J of Title 25 of the Administrative Code, it has the meaning given to it by 25 NCAC 01J .0604(6). While 25 NCAC 01J .0605(b) is located in Subchapter J of Title 25, it does not use the phrase "inactive disciplinary action," nor require that a disciplinary action be "active" – or not "inactive" – before it can be used as a "prior disciplinary action[]" to justify a career state employee's dismissal for unsatisfactory job performance. *See* 25 NCAC 01J .0605(b).

In order to affirm the ALJ's reading of the Administrative Code, we would need to insert a requirement into 25 NCAC 01J .0605(b) that the "two prior disciplinary actions" not be "inactive." Such a requirement is clearly not contained in 25 NCAC 01J .0605(b). While the code drafters certainly *could* have required that the written warnings not be "inactive" in order for them to count towards the "two prior disciplinary actions" needed before a career state employee can be dismissed, they did not.

---

4. The ALJ also noted that the North Carolina State Human Resources Manual ("the Manual") advises that "[a] disciplinary action . . . becomes inactive, i.e. cannot be counted towards the number of prior disciplinary actions that must be received before further action can be taken . . . when" any of the three circumstances outlined in 25 NCAC 01J .0604(6)(a)-(c) have been satisfied. However, as the ALJ recognized, the Manual has not been promulgated as a formal rule, and is not controlling. This Court has recognized that properly promulgated statutes and administrative regulations – and not a manual – are controlling in similar circumstances. *See Estate of Joyner v. N.C. Dep't of Health & Human Servs.*, 214 N.C. App. 278, 288-89, 715 S.E.2d 498, 506 (2011) (holding that the North Carolina Adult Medicaid Manual "merely explains the definitions that currently exist" in statutes, rules, and regulations).

We will not read a new requirement – that a warning not be "inactive" – into the code section at issue when such a requirement is not contained in the administrative regulation's clear and ambiguous text. *See State v. Singletary*, ___ N.C. App. ___, ___, 786 S.E.2d 712, 725 (2016) (rejecting a litigant's "extratextual interpretation" of a statute when such a "textual substitution" would be "contrary to the clear statutory mandate").

A plain reading of 25 NCAC 01J .0605(b) requires that a career state employee must have received "at least two prior disciplinary actions" before being subject to dismissal for a third disciplinary action. In the present case, it is not contested that Petitioner had received two disciplinary actions prior to the "current incident" which led to his dismissal. Each of the three written warnings advised Petitioner that he was subject to further discipline, up to and including dismissal from employment, if the deficiencies were not corrected. This met the requirements of 25 NCAC 01J .0605(b), and Respondent therefore had just cause to dismiss Petitioner from his position as plant manager.

The ALJ declined to reach the holding we reach today, reasoning that it would leave 25 NCAC 01J .0614(6)'s definition of inactive disciplinary action "meaningless." While the term inactive disciplinary action is currently inoperable because it is not used in Subchapter J of Title 25 of the Administrative Code, this does not foreclose future amendments to that section of the Administrative Code to give use to the term. We decline to make that amendment through judicial interpretation, and will not read a requirement into an administrative regulation that it plainly does not contain in order to make use of an otherwise inoperable definitional term. Having found the requirements of 25 NCAC 01J .0605(b) met, we hold that Respondent had just cause to dismiss Petitioner for unsatisfactory job performance, and the ALJ erred in reversing Respondent's dismissal. We therefore reverse the final decision of OAH.

REVERSED.

Judges DIETZ and TYSON concur.

FREEDMAN v. PAYNE

[253 N.C. App. 282 (2017)]

WILLIAM BARRY FREEDMAN AND FREEDMAN FARMS, INC., PLAINTIFFS
v.
WAYNE JAMES PAYNE AND MICHAEL R. RAMOS, DEFENDANTS

No. COA16-969

Filed 2 May 2017

Pleadings—motion for judgment on pleadings—breach of fiduciary duty—breach of contract—constructive fraud—fraud—law of the case doctrine—in pari delicto doctrine

The trial court did not err by granting defendant attorneys' motion for judgment on the pleadings or by dismissing plaintiff farmer's claims for breach of fiduciary duty, breach of contract, constructive fraud, and fraud (arising out of defendants' representation of plaintiff in federal district court over improper hog waste discharge) based upon the law of the case and *in pari delicto* doctrines. Plaintiff agreed to conceal an alleged "side deal" from the judge, and he lied under oath about the basis for his agreement to plead guilty. *Freedman I* established that plaintiff was *in pari delicto* with defendants and this holding became the law of the case.

Appeal by plaintiff from order entered 25 July 2016 by Senior Resident Judge Robert H. Hobgood in New Hanover County Superior Court. Heard in the Court of Appeals 21 March 2017.

Randolph M. James, PC, by Randolph M. James, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Melody J. Jolly and Patrick M. Mincey, for defendant-appellee Wayne James Payne.

Dickie, McCamey & Chilcote, PC, by Joseph L. Nelson, for defendant-appellee Michael R. Ramos.

ZACHARY, Judge.

William Barry Freedman (appellant) appeals from an order of the trial court dismissing his claims for breach of fiduciary duty, breach of contract, constructive fraud, and fraud brought against Wayne James Payne and Michael R. Ramos (defendants). On appeal, appellant argues that the trial court erred by dismissing his claims "based upon the law of the case and *in pari delicto* doctrines." After careful review of

appellant's arguments in light of the record on appeal and the applicable law, we conclude that the trial court did not err.

I. Background

On 1 December 2014, appellant and Freedman Farms filed a complaint against defendants "in New Hanover County Superior Court following defendants' representation of appellant in federal district court. In the complaint, appellant alleged professional malpractice, breach of fiduciary duty, constructive fraud, breach of contract, and fraud. Freedman Farms alleged fraud and breach of contract by a third-party beneficiary." *Freedman v. Payne*, __ N.C. App. __, __, 784 S.E.2d 644, 646 (2016) (*Freedman I*). On 18 December 2014, our Supreme Court granted defendants' motion to designate the case as exceptional and assigned the case to Senior Resident Superior Court Judge Robert H. Hobgood.

Defendants filed separate motions to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. On 19 March 2015, the court entered an order concluding that defendants' motions to dismiss appellant's claim for legal malpractice "should be allowed with prejudice based on *in pari delicto*[.]" The trial court denied defendants' motions to dismiss the remaining claims, and certified the matter for appellate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015). Plaintiff appealed the dismissal of his claim of legal malpractice to this Court, which affirmed the trial court's order in *Freedman I*. The factual background of this case was summarized in *Freedman I*:

> Appellant and his parents manage Freedman Farms, a multi-county farming operation in which they . . . operate several hog farms. . . . [In] December 2007, Freedman Farms discharged approximately 332,000 gallons of liquefied hog waste . . . into Browder's Branch, a water of the United States. . . . [A]ppellant and Freedman Farms were charged with intentionally violating the Clean Water Act. Appellant retained defendants to represent him.
>
> The trial began on 28 June 2011, and the prosecution put on evidence for five days. In appellant's complaint, he alleges that prior to the resumption of trial on 6 July 2011, defendant Ramos told appellant that the Assistant United States Attorney (AUSA) had approached him with a plea deal. . . . [A]ppellant states [that] defendant "Ramos asked AUSA Williams whether the government, in exchange for both [appellant] and Freedman Farms pleading guilty and

> agreeing to pay $1,000,000 in restitution and a $500,000 fine, would reduce the charges against [appellant] to a misdemeanor negligent violation of the Clean Water Act." . . . [A]ppellant claims that he asked defendant Ramos to negotiate the fines and restitution to $500,000, to take incarceration "completely off the table," and to make AUSA Williams agree that neither appellant nor Freedman Farms would be debarred from federal farm subsidies.
>
> Appellant further states in his complaint that when defendant Ramos returned from negotiating, he told appellant the following: the government was not interested in active time, the prosecutor agreed to "stand silent" at sentencing, appellant and Freedman Farms would avoid debarment from federal farm subsidies, and these promises were "part of a side-deal with [the prosecutor]–a wink-wink, nudge-nudge–and that [appellant] must not disclose this side-deal to the court," as it "would cost [appellant] the chance to assure that he would not be incarcerated." Accordingly, . . . appellant pleaded guilty to negligently violating the Clean Water Act. On 6 July 2011, the district court approved [the] plea agreement[]. Contrary to the terms of the alleged side-deal, in appellant's plea agreement, "the government expressly reserve[d] the right to make a sentence recommendation . . . and made no representations as to the effects of the guilty plea on debarment from Federal farm subsidies."
>
> On 13 February 2012, . . . [a]ppellant was sentenced to six months in prison and six months of house arrest[.] . . . Appellant obtained a new attorney[.] . . . The district court held a resentencing hearing on 1 October 2013 in which it vacated appellant's previous conviction. Pursuant to a new plea agreement, appellant again pleaded guilty to negligently violating the Clean Water Act. The district court imposed a sentence of "five years of probation . . . and ten months going forward of home detention[.]" . . . Appellant was also required to pay the remaining restitution that Freedman Farms owed[.] . . .

Freedman I, __ N.C. App. at __, 784 S.E.2d at 646-47. Our opinion in *Freedman I*, which is discussed in greater detail below, held that certain allegations in appellant's complaint established that appellant had

participated in the wrongdoing of which he accused defendants, and affirmed the trial court's dismissal of appellant's legal malpractice claim on the basis that appellant and defendants were *in pari delicto*.

The *Freedman I* opinion was filed in April, 2016. Thereafter, defendants filed separate motions asking the trial court to strike certain allegations of appellant's complaint or to enter judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) (2015), and to dismiss appellant's remaining claims for breach of contract, breach of fiduciary duty, constructive fraud, and fraud. Following a hearing conducted on 17 June 2016, the trial court entered an order on 25 July 2016 that granted defendants' motions for judgment on the pleadings and dismissed appellant's remaining claims. Appellant noted a timely appeal to this Court.

II. Standard of Review

This Court will "review *de novo* the grant of a motion to dismiss under Rule 12(b)(6) and for judgment on the pleadings under Rule 12(c)." *CommScope Credit Union v. Butler & Burke*, __ N.C. __, __, 790 S.E.2d 657, 659 (2016) (citations omitted). "On a motion for judgment on the pleadings, [a]ll well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Id.* (internal quotation omitted). In ruling on a party's motion for judgment on the pleadings, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citation omitted). "A Rule 12(c) movant must show that the complaint . . . fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar to a cause of action." *CommScope*, __ N.C. at __, 790 S.E.2d at 659 (internal quotation omitted).

III. Discussion

The trial court dismissed appellant's claims against defendants on the grounds that appellant was *in pari delicto* with defendants and that the law of the case, as established by this Court's opinion in *Freedman I*, required dismissal of appellant's claims. On appeal, appellant argues that the trial court erred by ruling that the doctrine of *in pari delicto* was applicable to his claims for breach of contract, breach of fiduciary duty, constructive fraud, and fraud. Appellant also contends that the holding of *Freedman I* does not constitute the law of the case with regard to these claims. We have considered, but ultimately reject, these arguments.

A. Doctrine of *In Pari Delicto*

The courts of this State "have long recognized the *in pari delicto* doctrine, which prevents the courts from redistributing losses among wrongdoers." *Whiteheart v. Waller*, 199 N.C. App. 281, 285, 681 S.E.2d 419, 422 (2009), *disc. review denied*, 363 N.C. 813, 693 S.E.2d 353 (2010). As explained in *Freedman I*:

> The common law defense by which the defendants seek to shield themselves from liability in the present case arises from the maxim *in pari delicto potior est conditio possidentis* [*defendentis*] meaning in a case of equal or mutual fault . . . the condition of the party in possession [or defending] is the better one. The doctrine, well recognized in this State, prevents the courts from redistributing losses among wrongdoers. The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains. No one is permitted to profit by his own fraud, or to take advantage of his own wrong, or to found a claim on his own iniquity, or to acquire any rights by his own crime.

Freedman I, __ N.C. App. at __, 784 S.E.2d at 648 (internal quotations omitted).

Freedman I upheld the trial court's dismissal of appellant's claim for legal malpractice based upon the doctrine of *in pari delicto*. Appellant's complaint alleged that defendants approached appellant about a plea agreement under the terms of which appellant would pay a substantial fine and would plead guilty to a misdemeanor offense, avoid imprisonment, and preserve access to certain federal programs. Appellant also alleged that defendants informed him that this was a secret "side deal" that could not be revealed to the federal judge presiding over the trial, that appellant agreed to conceal the alleged "side deal" from the judge, and that appellant lied under oath about the basis for his agreement to plead guilty. *Freedman I* held that certain allegations in appellant's complaint, which the Court accepted as true for purposes of a N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion, established appellant's wrongdoing and, based upon the doctrine of *in pari delicto*, barred appellant from seeking recovery for legal malpractice.

B. Law of the Case

The "law of the case" doctrine is well-established in the jurisprudence of our State. "[C]ertain points have been decided by the prior

[decision] of this Court and are thus the 'law of the case.' " *In re IBM Credit Corp.*, 222 N.C. App. 418, 421-22, 731 S.E.2d 444, 446 (2012). The Supreme Court of North Carolina has described the law of the case doctrine as follows:

> [A]s a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.
>
> However, the doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case. The doctrine does not apply to what is said by the reviewing court, or by the writing justice, on points arising outside of the case and not embodied in the determination made by the Court. Such expressions are *obiter dicta* and ordinarily do not become precedents in the sense of settling the law of the case.

Hayes v. Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956). This Court may not revisit issues that have become the law of a case:

> [O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. . . . [A] succeeding panel of that court has no power to review the decision of another panel on the same question in the same case.

N.C.N.B. v. Virginia Carolina Builders, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983). However, "the law of the case applies only to issues that were decided in the former proceeding, whether explicitly or by necessary implication[.]" *Goldston v. State*, 199 N.C. App. 618, 624, 683 S.E.2d 237, 242 (2009).

C. Discussion

We next apply the principles discussed above to the facts of this case. In *Freedman I*, appellant appealed from the trial court's dismissal of his claim for legal malpractice on the basis of the doctrine of *in pari delicto*. On appeal, appellant argued that the trial court erred "because . . . appellant's complaint does not establish as a matter of law his

intentional wrongdoing." *Freedman I*, __ N.C. App. at __, 784 S.E.2d at 647. This Court disagreed and held as follows:

> Here, treating the allegations in appellant's complaint as true as we must at this stage, defendants are at fault for striking a "side-deal" with the prosecutor regarding prison time and federal farm subsidies, and for instructing appellant that he must not disclose the side-deal to the court. Appellant is at fault for lying under oath in federal court by affirming that he was not pleading guilty based on promises not contained in the plea agreement. . . . Although appellant claims that his complaint does not establish his intentional wrongdoing, we agree with defendants that appellant's complaint shows otherwise. Appellant's complaint reveals the following [allegations]:
>
> > 34. Ramos returned and told [appellant] that AUSA Williams said the government was not interested in active time and that AUSA Williams had agreed to "stand silent" at sentencing and would not argue for an active sentence.
> >
> > . . .
> >
> > 36. Ramos also told [appellant] that . . . AUSA Williams told him that the government did not want to pursue debarment [from federal farm subsidies].
> >
> > . . .
> >
> > 38. Ramos then warned [appellant] that these promises from AUSA Williams were part of a side-deal with Williams–a wink-wink, nudge-nudge–and that [appellant] must not disclose this side-deal to the court, because this would upset Judge Flanagan and would cost [appellant] the chance to assure that he would not be incarcerated.
> >
> > . . .
> >
> > 41. . . . [F]aced with the opportunity to avoid incarceration and debarment, . . . [appellant] agreed to plead guilty, on the terms as described by Ramos.
> >
> > . . .

> 43. Ramos and Payne lied to [appellant] and Ms. Pearl about having an undisclosable side-deal, as a result of which [appellant] pled guilty, Ms. Pearl pled guilty on behalf of Freedman Farm[s], and both [appellant] and Freedman Farms became liable for $1,500,000 in fines and restitution.
>
> 44. The actual and only plea deal with AUSA Williams was precisely what appeared in the Plea Agreement itself that the government expressly reserve[d] the right to make a sentence recommendation and made no representations as to the effects of the guilty plea on debarment from Federal farm subsidies. . . .
>
> . . .
>
> Appellant lied under oath in order to benefit from an alleged side-deal in which he thought he could pay $1,500,000 to avoid going to prison. When the deal unraveled and appellant was bound by the express terms of his plea agreement, appellant attempted to redistribute the loss, which the courts of this State will not do. . . . Because appellant is in the wrong about the same matter he complains of, the law forbids redress. . . . Although the underlying criminal prosecution of appellant may have been complex, appellant was able to ascertain the illegality of his actions during the sentencing hearing. . . . "The allegations of the complaint are discreditable to both parties. They blacken the character of the plaintiff as well as soil the reputation of the defendant. As between them, the law refuses to lend a helping hand. The policy of the civil courts is not to paddle in muddy water, but to remit the parties, when *in pari delicto*, to their own folly. So, in the instant case, the plaintiff must fail in his suit."

Id. at __, 784 S.E.2d at 648-49 (quoting *Bean v. Detective Co.*, 206 N.C. 125, 126, 173 S.E. 5, 6 (1934)). Thus, *Freedman I* held as a matter of law that certain allegations in appellant's complaint established that he was *in pari delicto* with defendants. This holding became the law of the case, which we are without authority to revisit. As a result, it is definitively established that those allegations of appellant's complaint that were discussed in *Freedman I* show appellant to be *in pari delicto* with defendants.

Appellant argues that the holding of *Freedman I* applies only to the dismissal of his claim for legal malpractice and does not constitute the law of the case in his appeal from the dismissal of his other claims. It is true that this Court in *Freedman I* did not discuss appellant's claims for breach of contract, breach of fiduciary duty, constructive fraud, or fraud, as those claims were not before this Court. However, *Freedman I* held that appellant was barred from recovering damages for legal malpractice because specific allegations in appellant's complaint showed him to be *in pari delicto* with defendants. The holding of *Freedman I* did not depend upon analysis of appellant's allegations regarding legal malpractice. Instead, *Freedman I* held, without discussion of whether appellant had stated a valid claim against defendants for legal malpractice, that appellant was barred from recovery because, as a matter of law, specific allegations in appellant's complaint established his wrongdoing and therefore implicated the doctrine of *in pari delicto*. The same allegations that were at issue in *Freedman I* are also incorporated into each of appellant's other claims. Under *Freedman I*, these allegations establish both appellant's wrongdoing and also the legal holding that appellant is *in pari delicto* with defendants. This conclusion, which we may not revisit, is independent of the specific allegations regarding the remaining claims.

Appellant also argues that the allegations of his complaint do not support the application of the doctrine of *in pari delicto* to the claims whose dismissal he has appealed. Appellant directs our attention to the fact that these claims are supported by factual allegations that are specific to each claim. In addition, appellant contends that his culpability was less than that of defendants, making application of the doctrine of *in pari delicto* improper. Appellant fails to acknowledge, however, that *Freedman I* held that appellant was *in pari delicto* with defendants based upon specific allegations which are part of each of the claims that were dismissed. We conclude that the trial court did not err by ruling that the holding of *Freedman I*, which became the law of the case, required dismissal of appellant's remaining claims.

IV. Conclusion

For the reasons discussed above, we conclude that the trial court did not err by granting defendants' motions for judgment on the pleadings or by dismissing appellant's claims and that its order should be

AFFIRMED.

Judges BRYANT and INMAN concur.

IN RE J.S.C.

[253 N.C. App. 291 (2017)]

IN THE MATTER OF J.S.C.

No. COA16-1222

Filed 2 May 2017

Child Abuse, Dependency, and Neglect—abuse and neglect—sufficiency of findings

The trial court did not err by adjudicating a minor child as abused and neglected where respondent mother failed to challenge the sufficiency of the stipulated findings.

Appeal by respondent-mother from orders entered 8 August 2016 and 6 September 2016 by Judge J.H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 17 April 2017.

Regina Floyd-Davis for petitioner-appellee New Hanover County Department of Social Services.

Marie H. Mobley for guardian ad litem.

Richard Croutharmel for respondent-appellant mother.

ZACHARY, Judge.

Respondent-mother appeals from a consent order adjudicating her son "Jonah"[1] an abused and neglected juvenile, together with the resulting dispositional order that maintained the child in the custody of New Hanover Department of Social Services ("DSS") and directed DSS to cease efforts toward reunification. Respondent-father has withdrawn his appeal by filing notice in the trial court pursuant to N.C. R. App. P. 37(e).

On 23 September 2015, DSS filed a juvenile petition claiming that seven-month-old Jonah was abused and neglected. The petition alleged that respondents brought Jonah to the hospital for "leg and arm spasms . . . similar to seizures." The spasms had been occurring for a period of two to three weeks. An initial examination revealed that Jonah had experienced two "brain bleeds, one appearing old in nature, the other appearing of a more recent nature." X-rays also showed a possible skull

1. We use this pseudonym to protect the juvenile's identity and for ease of reading.

fracture. Jonah was transferred to UNC-Chapel Hill Medical Center, where doctors found injuries consistent with

> significant high impact trauma to the head. There is an old injury to the right side of the head manifested by the appearance of old blood and dead tissue with shrinkage of the brain noted. This is demonstrative of an injury which occurred weeks to months earlier. There is a very large amount of fluid on the brain, representative of an injury which occurred days to weeks earlier. The MRI revealed evidence of possible shearing injuries.

A doctor described Jonah's injuries to DSS as "very significant for non-accidental trauma." According to the petition, respondents were unable to account for "the severity of the injuries that [Jonah] has sustained." They cited several instances of Jonah falling from his bed, changing table, or stroller, as well as one occasion when a recoiling screen door had struck the child in the head.

Both respondents were charged with felonious child abuse. In July 2016, respondent-mother pleaded guilty to child abuse by grossly negligent omission resulting in serious bodily injury to the child. N.C. Gen. Stat. § 14-318.4(a4) (2015). She was sentenced to an active prison term of twenty-five to forty-two months.

On 8 August 2016, respondents appeared in court and tendered a "Consent Order on Adjudication" signed by all parties and their counsel.[2] The order provides that the parties "have stipulated and agreed to the entry of this Order which provides for the following facts, conclusions of law and order" adjudicating Jonah as neglected and abused. Among the parties' stipulated facts are the following:

> 4. [Jonah] is a neglected and abused juvenile in that a parent, guardian, custodian or caretaker has inflicted or allowed to be inflicted a serious physical injury by other than accidental means, in that on or about September 22, 2015, [Jonah] was diagnosed with a possible skull fracture and two brain bleeds and said injury has been determined to be non-accidental by his treating physicians.
>
> . . .

2. The transcript reflects that respondent-father and his counsel signed the consent adjudication order during the hearing.

> 6. The enormity and consequences of the injuries to the minor child were increased as a result of one or both parents failing to seek medical treatment in a timely manner.
>
> 7. The parents were subsequently charged with having committed felonious assault on the child. Respondent Father is presently awaiting trial . . . . Respondent Mother entered into a plea agreement on or about July 21, 2016 wherein she pled guilty to one count of felony child abuse-neglect- serious bodily injury.
>
> . . .
>
> 13. The stipulations and agreements made regarding the factual circumstances set forth herein are made by the parents after thoughtful consideration as to the best interest of their child and for the purposes of resolving this case in the most expeditious manner.

The order reserved the rights of all parties "to present any further evidence or reports . . . at the disposition hearing."

After signing the consent adjudication order, the trial court proceeded to disposition. It received written reports prepared by DSS and the guardian *ad litem* and heard arguments from counsel. In its "Order on Disposition" entered 6 September 2016, the court maintained Jonah in DSS custody, ceased reunification efforts with the parents, and scheduled a permanency planning hearing for 15 September 2016. Respondents were each awarded one hour per month of supervised visitation upon their release from confinement.

In her lone argument on appeal, respondent-mother challenges the validity of the "Consent Adjudication Order" based on the trial court's failure to state that the adjudicatory findings of fact were made under the "clear and convincing evidence" standard of proof required by N.C. Gen. Stat. § 7B-805 (2015). She cites our decision in *In re Church*, 136 N.C. App. 654, 525 S.E.2d 478 (2000), in which we reversed an ordering terminating parental rights due to the failure of the "trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding." *Id.* at 657, 525 S.E.2d at 480; *see also* N.C. Gen. Stat. § 7B-1109(f) (2015) (requiring petitioner to prove facts by "clear, cogent, and convincing evidence" at the adjudicatory stage of a termination proceeding); *In re D.R.B.*, 182 N.C. App. 733, 739, 643 S.E.2d 77, 81 (2007) (citation omitted) (requiring termination order to "indicate the evidentiary standard under which the court made its adjudicatory findings of

fact"). Respondent-mother further states that this Court has applied the holding in *In re Church* to an initial adjudication of abuse, neglect, or dependency under N.C. Gen. Stat. § 7B-805. *See In re E.N.S.*, 164 N.C. App. 146, 152, 595 S.E.2d 167, 171 (noting "there is clear case law that holds the order of the trial court must affirmatively state the standard of proof utilized"), *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903-04 (2004) (citation omitted). However, we find *Church* and its progeny distinguishable from the present case.

Article 8 of the Juvenile Code provides two procedural paths for an adjudication of abuse, neglect, or dependency: an adjudicatory hearing or an adjudication by consent. As we explained in *In re K.P.*, __ N.C. App. __, 790 S.E.2d 744 (2016):

> When a juvenile is alleged to be abused, neglected, or dependent, N.C. Gen. Stat. § 7B-802 (2015) requires the court to conduct an "adjudicatory hearing" in the form of "a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." . . . "[T]he allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2015). . . .
>
> "An adjudication of abuse, neglect or dependency *in the absence of an adjudicatory hearing* is permitted only in very limited circumstances." N.C. Gen. Stat. § 7B-801(b1) (2015) authorizes the court to enter "a consent adjudication order" only if: (1) all parties are present or represented by counsel, who is present and authorized to consent; (2) the juvenile is represented by counsel; and (3) the court makes sufficient findings of fact.

Id. at __, 790 S.E.2d at 747 (quoting *In re Shaw*, 152 N.C. App. 126, 129, 566 S.E.2d 744, 746 (2002)) (emphasis added).

The statute upon which respondent-mother relies, N.C. Gen. Stat. § 7B-805, is titled "Quantum of proof in *adjudicatory hearing*." *Id.* (emphasis added). In *In re Church* and each additional case cited by respondent-mother, the trial court entered its order after an adjudicatory hearing – either at the initial adjudication stage under Article 8 or in a termination of parental rights proceeding under Article 11, *see* N.C. Gen. Stat. § 7B-1109 (2015). *In re J.D.S.*, 170 N.C. App. 244, 247, 253, 612 S.E.2d 350, 353, 356, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 584

(2005); *E.N.S.*, 164 N.C. App. at 148, 152, 595 S.E.2d at 169, 171; *Church*, 136 N.C. App. at 655, 525 S.E.2d at 479.

Here, the trial court entered a consent adjudication order pursuant to N.C. Gen. Stat. § 7B-801(b1), without an adjudicatory hearing and based entirely on stipulated facts. *See generally In re I.S.*, 170 N.C. App. 78, 86, 611 S.E.2d 467, 472 (2005). (" '[S]tipulations are judicial admissions and are therefore binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish an admitted fact.' " (quoting *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981))). As there was no adjudicatory hearing, the court did not receive or weigh evidence, assess the credibility of witnesses, or otherwise engage in the process of fact-finding. *See generally In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (noting "the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony"). The court thus had no occasion to apply the "clear and convincing evidence" standard of proof or any other standard. Under these circumstances, we decline to extend our holding in *In re Church* to find reversible error based on the failure of the consent adjudication order to state the evidentiary standard contained in N.C. Gen. Stat. § 7B-805.[3]

Respondent-mother does not challenge the sufficiency of the stipulated findings to support Jonah's adjudication as an abused and neglected juvenile. *See* N.C. Gen. Stat. § 7B-801(b1) (requiring consent adjudication order to contain "sufficient findings of fact"). Nor does she

---

3. Another statute in Article 8, N.C. Gen. Stat. § 7B-807 (2015) ("Adjudication"), expressly provides that "[i]f the court finds from the evidence, *including stipulations by a party*, that the allegations in the petition have been proved by clear and convincing evidence, *the court shall so state*." (Emphasis added); *see also Church* 136 N.C. App. at 657, 525 S.E.2d at 480 (citing the statutory forebear to § 7B-807 to "note the legislature has specifically required the standard of proof utilized by the trial court be affirmatively stated in the context of . . . abuse, neglect and dependent proceedings").

Here, the trial court did not make any findings of fact, in that the parties consented to and stipulated to the entire order. Accordingly, section 7B-807 does not appear to be applicable. Moreover, respondent-mother does not cite to section 7B-807 in her principal brief, and her reference to the statute in her reply brief is insufficient to present a claim on appeal. *Larsen v. Black Diamond French Truffles, Inc.*, __ N.C. App. __, __, 772 S.E.2d 93, 96 (2015) (holding that "where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief").

claim error with regard to the court's dispositional order. Accordingly, both orders are affirmed.

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

TRISTA MICHELLE LaPRADE (formerly Trista Michelle Barry), Plaintiff
v.
CHRISTOPHER BARRY, Defendant

No. COA16-11

Filed 2 May 2017

1. Child Custody and Support—custody modification—substantial change of circumstances

The trial court did not err by concluding that a substantial change of circumstances justified child custody modification where there were issues regarding communication between the parents and the father's care of the child.

2. Child Custody and Support—custody modification—motion to dismiss—sufficiency of evidence

Although defendant father contended the trial court erred in a child custody modification case by denying his motions to dismiss, there was a substantial change of circumstances concerning the parents' unwillingness or inability to communicate in a reasonable manner regarding their child's needs.

3. Child Custody and Support—custody modification—circumstances at all relevant times—specific findings

The trial court did not err in a child custody modification case by allegedly refusing to allow defendant father to ask questions that dealt with circumstances of co-parenting that existed at the time of the previous order and prior to the existing order. The findings showed the circumstances at all relevant times.

Appeal by defendant from order entered 22 May 2015 by Judge Peter Knight in District Court, Henderson County. Heard in the Court of Appeals 8 August 2016.

Emily Sutton Dezio, for plaintiff-appellee.

Donald H. Barton, P.C., by Donald H. Barton, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order modifying custody by granting plaintiff primary custody of the parties' child. Because the trial court's findings of fact support its conclusion of a substantial change of circumstances which affects the child's welfare due to father's failure to communicate with the mother and interference with the child's relationship with her mother, as well as mother's positive changes in behavior, we affirm.

I. Background

In December of 2005, plaintiff and defendant were married. In September of 2007, the couple had one child, Reagan.[1] The parties separated in 2009 and since have engaged in a continuing battle regarding custody. In June of 2010, plaintiff-mother filed a verified divorce complaint and alleged "[t]hat there are no issues of child support, custody, alimony or equitable distribution pending between the parties as they have heretofore entered into a separation agreement that they wish to be incorporated into the divorce judgment." Mother also asked that the separation agreement be incorporated into the divorce judgment. In July of 2010, father filed a verified answer and counterclaimed for divorce and primary custody of Reagan. In August of 2010, mother filed a motion to amend her divorce complaint because

> it was discovered that the Plaintiff had a misconception about the child custody and welfare, child welfare, and child support paragraphs in the separation agreement she had drafted. The Plaintiff was under the misconception that joint custody, as agreed to in the separation agreement, was the same as her having joint primary custody. According to the Plaintiff, the Defendant's visitation schedule was in line with the Defendant having secondary joint custody of the minor child.

That same month, mother also filed a reply to father's counterclaim requesting primary custody.

---

1. A pseudonym will be used to protect the identity of the minor child.

On 2 September 2010, the trial court entered a consent order allowing mother's motion to amend her complaint and granting the parties' requests for divorce. On 15 February 2011, the trial court entered a permanent custody order which granted physical custody to mother from Tuesday to Saturday and to father from Saturday to Tuesday.

In May of 2012, mother filed a motion to modify the custody order alleging a substantial change of circumstances because father was primarily relying on his girlfriend to care for Reagan. Mother alleged that the girlfriend was mean to Reagan and caused Reagan medical problems due to issues with diaper cream. Mother contended that Reagan was anxious and stressed when it was time for her to be with her father. In September of 2012, father also filed a motion to modify custody based on a number of allegations but mostly relying upon mother's remarriage to someone with a criminal record.

On 19 December 2012, the trial court modified the permanent custody order, giving primary physical care and custody to father and secondary physical custody to mother for several reasons, including mother repeatedly taking the child to the doctor and alleging abuse after visits with father despite no signs of abuse, an issue of domestic violence between mother and her husband, and the parties' overall utter inability to work together for the benefit of Reagan.

In April of 2014, mother filed another motion to modify custody alleging a substantial change of circumstances for several reasons, again primarily concerned with father's girlfriend being the primary caretaker for the child and usurping her role as the child's mother. The trial court held a hearing on the motion over five days, beginning on 20 January 2015 and ending on 18 March 2015. On 22 May 2015, the trial court entered an order modifying custody and granting primary physical care and custody to mother. Father appeals.

II. Change of Circumstances

[1] Father first contends that the trial court erred in determining that a substantial change of circumstances had occurred justifying a modification of custody. Father takes an unusual approach to his argument. Father failed to directly challenge the sufficiency of the evidence to support the trial court's findings of fact which form the basis for the trial court's conclusion of a substantial change of circumstances but instead created a table of the transcript testimony, highlighting evidence he believes undermines the trial court's findings of fact. In other words, rather than arguing the findings of fact are not supported by the evidence, he directs the Court's attention to other contradictory evidence

which might support a different finding of fact. For example, the first row of 25 total rows reads:

Pages 15-16	Mrs. LaPrade says that her ex rarely communicates what is going on in the child's life however on page 16 she provides no examples of what things she is missing she say's [(sic)] "I just assume so."

A. Standard of Review

> It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody. The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.
>
> As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests.
>
> The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change

in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.

In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 473–75, 586 S.E.2d 250, 253–54 (2003) (citations, quotation marks, and brackets omitted).

B. Trial Court's Findings Regarding Change of Circumstances

The trial court's order first sets forth a summary of the circumstances at the time of entry of the prior order in a section helpfully entitled "[a]t the time of the entry of the Order[.]" In brief summary, Reagan was 5, in a private kindergarten, and attended gymnastics class each week; mother had been taking the child repeatedly for unnecessary physical examinations in an attempt to show that father or someone in his home was abusing her; mother was repeatedly contacting law enforcement regarding her allegations of abuse against father; mother was not employed or in school; father's girlfriend cared for the child when he was at work; and neither party was communicating with the other about the child.

In the next section, entitled "[a]t the time of this hearing upon Plaintiff mother's Motion to Modify Custody[,]" the trial court sets out its findings of fact regarding the current circumstances of Reagan and the parties: Reagan was age 7, in second grade in a public school, and still active in gymnastics. The trial court found that

> the parties have been polarized, with the Defendant and his girlfriend keeping tight control of [Reagan] prior to and following the sessions, and severely limiting contact between [Reagan] and the Plaintiff and any one in her party, including Defendant's own mother. The Defendant's practice in this regard has had a negative effect upon [Reagan]: her anxiety level is high.

The trial court noted mother's living circumstances but did not find any relevant changes from the time of the prior order. The order then makes detailed findings of fact, and finding of fact 36 specifically notes which findings it based its finding of a substantial change of circumstances upon:

> 36. The undersigned finds that two patterns of conduct which were engaged in by the Plaintiff at the time of the Order are no longer occurring. Specifically,
>
> a. There is no evidence that the Plaintiff mother has taken the child for any unnecessary physical examinations, in an effort to prove that the Defendant father or someone in the Defendant's home was abusing the child, since the time of the entry of the Order.

> b. The Plaintiff mother has not since the entry of the Order, contacted law enforcement authorities in an effort to initiate an investigation of the Defendant father's possible abuse of the child.

The trial court then concluded its findings of fact within finding of fact 37:

> The fact[s] found in the preceding finding number 36, together with the facts found in finding number 16, finding number 25, finding number 30, finding number 31, among other findings, constitute a substantial change of circumstances since the entry of the Order, which change of circumstances has materially affected the welfare of the child [Reagan.]

C. Re-weighing Evidence

Father's argument, with his table of testimony highlights, asks us to re-weigh the evidence in his favor, and this we cannot and will not do. *Id.* at 475, 586 S.E.2d at 253-54 ("[S]hould we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.") Furthermore, as father has failed to challenge the trial court's findings of fact as not supported by the evidence but instead argued for alternative findings, these findings are now binding upon this Court. *See id*; *see also In re J.K.C.*, 218 N.C. App. 22, 26, 721 S.E.2d 264, 268 (2012) ("The trial court's remaining unchallenged findings of fact are presumed to be supported by competent evidence and binding on appeal.")

D. Adverse Effect

Father then argues that the evidence does not show any adverse effect upon Reagan:

> [a] review of all of the transcripts of all of the proceedings reveals information that none of the activities complained of had any affect adversely or otherwise, on the child's school attendance, performance, grades, medical and dental conditions, interactions with friends, relatives and that her mother talks to her every night.

We first note that our consideration is based upon the findings of fact made by the trial court, which we have already determined are binding. It is not our role to do a "review of all of the transcripts of all of the proceedings" to find the information father favors. *See Shipman*,

357 N.C. at 474, 586 S.E.2d at 253. But essentially, father's argument is that a major issue since the inception of this case has been the parties' inability to communicate and father seems to contend that because it has always been a problem, it cannot constitute a substantial change of circumstances. Even if we concede father's dim view of the parties' communication history, his brief ignores that the trial court's findings of fact which noted both that father's *present* actions had adversely affected the child *and* mother's *present* circumstances had improved to the child's benefit.

The binding findings of fact establish:

> 19. The parties continue to communicate almost exclusively by text messages. The [father] often fails to respond to messages and inquiries from the [mother], and at other times often believes that a one-word response is sufficient. The undersigned finds as a fact that the [father's] practices result in an inability to cooperate for [Reagan's] benefit, and therefore has a negative impact upon [Reagan's] welfare.
>
> . . . .
>
> 25. . . . .
>
> Generally, the return calls from [Reagan] to her mother are made on speakerphone, with the [father] or [his girlfriend] listening in. It is not unusual for [father's girlfriend] to suggest answers to [Reagan], by whispered voice audible on the speakerphone connection. . . .
>
> [Reagan] is often in the sole care of [father's girlfriend] when she is in Defendant father's custody. The Defendant father and [his girlfriend] have regularly refused to provide to the Plaintiff mother the cell telephone number for [the girlfriend].

As to the significant positive changes mother has made, as noted above, the trial court found that mother's "patterns of conduct" had changed in that she stopped taking the child for unnecessary physical examinations and contacting law enforcement to try to have father investigated for abuse.

It is beyond obvious that a parent's unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child's needs may adversely affect a child, and the trial court's

findings abundantly demonstrate these communication problems *and* the child's resulting anxiety from her father's actions. While father is correct that this case overall demonstrates a woeful refusal or inability of both parties to communicate with one another as reasonable adults on many occasions, we can find no reason to question the trial court's finding that these communication problems are *presently* having a negative impact on Reagan's welfare that constitutes a change of circumstances. *See generally Shipman*, 357 N.C. at 473–75, 586 S.E.2d at 253–54. In fact, it is foreseeable the communication problems are likely to affect Reagan more and more as she becomes older and is engaged in more activities which require parental cooperation and as she is more aware of the conflict between her parents. Therefore, we conclude that the binding findings of fact support the conclusion that there was a substantial change of circumstances justifying modification of custody. This argument is overruled.

III. Motion to Dismiss

[2] Father next contends that "the trial court committed reversible error in denying defendant father's motion to dismiss at the close [of] the plaintiff's evidence and at the close of all the evidence." The entire substance of father's argument in this section is as follows:

> There was no substantial relevant competent evidence introduced at the time of the close of Plaintiff [(sic)] evidence or at the close of all the evidence that a substantial change of circumstances affecting the welfare of the parties[']minor child had occurred since the entry of the honorable Judge Brooks order and Defendant Father's motion should have been granted.

As we have already determined that the trial court's binding findings of fact support its conclusion of law regarding a substantial change of circumstances, we need not address this argument. *See generally In re J.K.C.*, 218 N.C. App. at 26, 721 S.E.2d at 268.

IV. Father's Evidence

[3] Lastly, father also contends that "the trial court commit[t]ed reversible error in refusing to allow the defendant father to ask questions that dealt with circumstances that existed at the time of the previous order and prior to the existing order." Father directs us to the transcript where his attorney was cross-examining mother and asked her why she "can co-parent with my client now as opposed to" in the past? Mother responded that father had prevented her from doing so. Father's counsel

then stated, "So it's his fault that you alleged sexual abuse by him . . . [,]" and was then interrupted by an objection from mother's attorney which the trial court sustained. The entirety of his counsel's argument before the trial court was:

> The fact is she's not saying there's any difference now as there was in the past, and I'm questioning her credibility on her statement that she can do it now and that there's – she's always tried with this gentleman to co-parent and that it's my client's fault. So I don't know how in the world I could possibly accept that as an answer and not have to delve back into a little bit of what she's done in the past.

Father's counsel seems to be arguing that he should have been allowed to present evidence of mother's past behavior which occurred prior to entry of the previous order. But the prior orders had findings of fact regarding mother's behavior; custody was modified adversely to her in the prior order based upon that behavior. In fact, the trial court specifically found that mother no longer made abuse allegations against father as she had at the time of the prior order. Thus, the trial court not only acknowledged the past behavior father's counsel wished to question mother on, but also noted the current change of that behavior. In any event, father made no offer of proof for any additional evidence he wanted to present, so we cannot address his argument further. *See State v. Dew*, 225 N.C. App. 750, 759, 738 S.E.2d 215, 221 (2013) ("It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify. For that reason, in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. In the absence of an adequate offer of proof, we can only speculate as to what the witness' answer would have been. As a result of the fact that the record does not contain the substance of any answer that Detective Curry might have given to the question posed by Defendant's trial counsel, we have no basis for determining the extent, if any, to which the trial court's ruling might have prejudiced Defendant." (citations, quotation marks, and brackets omitted)).

Ultimately, father's entire brief reiterates that there is nothing new here; he and mother have always had poor communication regarding Reagan and his girlfriend has always primarily cared for her when in his care. Even if all that is true, the trial court's findings support its

conclusion of a substantial change of circumstances since as Reagan has gotten older, these actions affect her more adversely and mother's behaviors have changed for the better. Beyond that, the trial court made many more findings — which we need not address in detail here — to support its conclusions. In fact, we must commend the trial court's very well-organized and thorough order. The findings clearly delineate the circumstances at the time of the prior order, at the time of the current hearing, and the specific findings which the trial court found to support its conclusion of a change of circumstances.

For the foregoing reasons, we affirm.

AFFIRMED.

Chief Judge McGEE and Judge CALABRIA concur.

STATE OF NORTH CAROLINA
v.
ERIC JONATHAN COX

No. COA16-1068

Filed 2 May 2017

1. Constitutional Law—right to speedy trial—delay in bringing before magistrate—holding without bond

The trial court did not err in a prosecution for second-degree murder and other charges by denying defendant's motion to dismiss due to a seven-hour delay in bringing him before a magistrate. Defendant was afforded multiple opportunities to have witnesses or an attorney present, which he elected not to exercise.

2. Evidence—cross-examination—limitation on scope

The trial court did not err in an impaired driving case, resulting in a car accident and death of the other driver, by preventing defendant from cross-examining a witness regarding the contents of a verified complaint in a related civil case. Defendant failed to show that the trial court's decision to limit the scope of cross-examination influenced the jury's verdict.

3. Negligence—jury instruction—proximate cause—intervening negligence

The trial court did not err in an impaired driving case, resulting in a car accident and death of the other driver, by using the applicable pattern jury instruction and supplemental instruction for proximate cause. Defendant failed to show plain error was caused by the absence of a jury instruction on intervening negligence where the evidence showed that defendant drove through a red light while grossly impaired and caused a crash.

4. Motor Vehicles—jury instruction—felonious serious injury by vehicle—driving under the influence

The trial court did not err in an impaired driving case, resulting in a car accident and death of the other driver, by instructing the jury with regard to the charge of felonious serious injury by vehicle. The trial court instructed the jury in conformity with the law, and a showing that defendant's action of driving while under the influence was one of the proximate causes was sufficient evidence.

5. Negligence—failure to properly restrain in child seat—not evidence of negligence or contributory negligence

The trial court did not abuse its discretion in an impaired driving case, resulting in a car accident and death of the other driver, by excluding evidence that the child passenger in the other car was not properly restrained in a child seat. A child restraint system violation is not evidence of negligence or contributory negligence.

Appeal by defendant from judgment entered 7 July 2016 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for defendant-appellant.

TYSON, Judge.

Eric Jonathan Cox ("Defendant") appeals from his convictions of second-degree murder, felonious serious injury by vehicle, driving while impaired, and failure to comply with a driver's license restriction. We find no error.

I. Background

A. Evidence Presented at Trial

Hluon Siu finished working her second shift at Metrolina Greenhouse in Charlotte at approximately 1:00 a.m. on Monday, 28 November 2011. She picked up her four-year-old son, Khai, from his father's home at approximately 2:00 a.m. Ms. Siu was driving a white 2004 Nissan Altima sedan. Khai was seated in a booster seat in the rear passenger seat.

Ms. Siu was driving outbound on The Plaza, which has two lanes of outbound traffic, two lanes of inbound traffic, and a left turn lane. At 2:37 a.m., Ms. Siu was driving through a green light at the intersection of East Sugar Creek Road, when her vehicle was struck on the driver's side by a 2000 gray Chevrolet Tahoe driven by Defendant. The evidence tended to show Defendant, who was traveling on Sugar Creek Road, failed to stop at a red light prior to entering the intersection. Ms. Siu was killed almost immediately by the impact.

Carmen Hayes witnessed the crash and testified Defendant's vehicle "flew across" the intersection. Hayes opined Defendant's vehicle was traveling between fifty and sixty miles per hour, even though the posted speed limit at the intersection was thirty-five miles per hour. Hayes was clearly able to see the traffic signals at the intersection, and testified the light was green in Ms. Siu's lane of travel. Hayes testified Defendant got out of his vehicle, appeared to be uninjured, and "he just kind of stood there" and did "absolutely nothing." She stated, "He never once asked is she okay, he was not apologetic, he stood there. . . . No remorse."

Pamela Pittman and her daughter also witnessed the crash, and they both testified the light in Ms. Siu's lane of travel was green. Pittman immediately went to Ms. Siu's overturned vehicle to render assistance. She testified Defendant stood beside his vehicle and walked around with his hands in his pockets.

Charlotte-Mecklenburg Police Sergeant David Sloan was assigned to the Department's Major Crash Unit. At approximately 2:45 a.m., Sergeant Sloan contacted Sergeant Jesse Wood, Officer Jonathan Cerdan, and Detective Matthew Sammis to assist in investigation of the crash. The three officers arrived at the scene, where several other officers were already present.

Defendant was seated in the backseat of a patrol vehicle. Officer Cerdan was assigned to evaluate Defendant for impairment. Officer Cerdan had arrested Defendant for driving while impaired in 2009 and recognized his personalized license plate. Officer Cerdan observed Defendant's eyes

to be red, watery and bloodshot. A strong odor of alcohol emanated from Defendant's breath. Defendant initially denied drinking alcohol, but later stated to Officer Cerdan he drank a glass of wine at 9:00 p.m. and had taken "DayQuil and NyQuil" earlier that day.

Officer Cerdan performed field sobriety testing on Defendant. On the horizontal gaze nystagmus test, Defendant manifested all six clues of impairment. On the walk-and-turn test, Defendant stopped for re-instruction after the first nine steps, took an improper turn, and displayed difficulty maintaining balance. On the one leg stand test, Defendant swayed and used his arms for balance. After completing the field sobriety tests, Officer Cerdan formed the opinion that Defendant's mental and physical faculties were appreciably impaired by alcohol. Defendant was arrested for driving while impaired and for failure to comply with his .04 blood alcohol concentration restriction on his driver's license.

Officer Cerdan transported Defendant to Carolinas Medical Center-Mercy Hospital for chemical analysis of Defendant's blood. They arrived at the hospital at 4:33 a.m. Defendant signed the implied consent rights form and did not exercise his right to contact an attorney or request a witness to view the testing procedure. The first blood sample was drawn by a registered nurse from Defendant at 4:55 a.m. A subsequent chemical analysis of Defendant's blood sample by the Charlotte-Mecklenburg Police crime lab revealed a .17 blood alcohol concentration.

Defendant was transported to the Mecklenburg County Law Enforcement Center and interviewed by Officer Cerdan and Detective Sammis. Defendant was read Miranda rights at 6:15 a.m. and waived his right to have an attorney present during questioning. At the conclusion of the interview, Detective Sammis charged Defendant with second-degree murder and felonious serious injury by vehicle.

At the conclusion of his investigation of the crash, Detective Sammis determined that Defendant was traveling on East Sugar Creek Road and failed to stop for a properly working red light at its intersection with The Plaza. Defendant hit Ms. Siu's vehicle while traveling approximately 48.6 miles per hour. Ms. Siu was driving through a green light on The Plaza at approximately 36.8 miles per hour at the time Defendant struck her vehicle. There was no evidence of any "pre-impact braking" from tire marks on the road.

Detectives retrieved an iPhone from the driver's side floorboard of Defendant's vehicle. One of the text messages stored in Defendant's phone was sent about fourteen hours prior to the crash, and stated, "I

might drink a little more than I should tonight." Defendant did not offer any evidence at trial.

B. Appellate History

On 16 September 2014, the jury convicted Defendant of all charges. The trial court sentenced Defendant to an active sentence of 175 to 219 months for the second-degree murder conviction, 5 days for the operation of a vehicle in violation of a license restriction, and a consecutive sentence of 33 to 49 months for the conviction of felonious serious injury by vehicle. Defendant appealed to this Court.

On appeal, Defendant argued, *inter alia*, "that his statutory and constitutional rights were violated by an unnecessary seven-hour delay between his arrest and appearance before a magistrate, requiring the trial court to dismiss the charges." *State v. Cox*, No. 15-244, 2016 N.C. App. LEXIS 149, at *1 (N.C. Ct. App., Feb. 16, 2016) ("*Cox I*").

In an unpublished opinion filed 16 February 2016, this Court determined "the trial court's order denying Defendant's motion to dismiss failed to resolve all material issues of fact and law presented in that motion." We vacated the order and remanded to the trial court "for further findings and conclusions." *Id.* On remand, the trial court entered an amended order denying Defendant's motion to dismiss on 27 April 2016.

Because this Court vacated the order denying Defendant's motion to dismiss and remanded, the remaining issues Defendant raised on appeal in *Cox I* were not ruled upon. Defendant appeals from the amended order, entered on remand, and also raises the same issues he asserted in his previous appeal.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Issues

Defendant argues the trial court erred by: (1) denying his motion to dismiss due to the delay in bringing him before a magistrate; (2) preventing him from cross-examining a witness regarding the contents of a verified complaint; (3) excluding evidence that the child victim was not properly restrained in a child seat; (4) instructing the jury on proximate cause; and (4) instructing the jury on a lesser standard of proof than required by statute.

IV. Denial of Defendant's Motion to Dismiss

[1] Defendant argues the trial court prejudicially erred by denying his motion to dismiss, because the delay in bringing him before a judicial officer and the magistrate's error in holding him without bond violated his constitutional rights. We disagree.

A. Standard of Review

"Dismissal of charges for violations of statutory rights is a drastic remedy which should be granted sparingly. Before a motion to dismiss should be granted . . . it must appear that the statutory violation caused irreparable prejudice to the preparation of defendant's case." *State v. Labinski*, 188 N.C. App. 120, 124, 654 S.E.2d 740, 742-43 (citation, quotation marks, and italics omitted), *disc. review denied*, 362 N.C. 367, 661 S.E.2d 889 (2008).

The standard of review on appeal of the denial of a motion to dismiss is "whether there is competent evidence to support the findings and the conclusions. If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *State v. Lewis*, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001) (internal citations and quotation marks omitted). Findings of fact which are not challenged "are presumed to be correct and are binding on appeal. We [therefore] limit our review to whether [the unchallenged] facts support the trial court's conclusions." *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990) (citations omitted).

B. Statutory Requirements upon Arrest

N.C. Gen. Stat. § 15A-511(a)(1) (2015) provides: "A law-enforcement officer making an arrest . . . must take the arrested person without unnecessary delay before a magistrate as provided in G.S. 15A-501." N.C. Gen. Stat. § 15A-501 provides:

> Upon the arrest of a person, with or without a warrant, . . . a law enforcement officer:
>
> (2) Must, with respect to any person arrested without a warrant and, for purpose of setting bail, with respect to any person arrested upon a warrant or order for arrest, take the person arrested before a judicial official without unnecessary delay.
>
> . . . .

> (5) Must without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him reasonable time and reasonable opportunity to do so.

N.C. Gen. Stat. § 15A-501(2), (5) (2015).

Our Supreme Court has held that "[u]nquestionably, the failure of law enforcement personnel in complying with the provisions of [N.C. Gen. Stat. § 15A-511 and N.C. Gen. Stat. § 15A-501] can result in the violation of a person's constitutional rights." *State v. Reynolds*, 298 N.C. 380, 398, 259 S.E.2d 843, 854 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980); *see also* N.C. Gen. Stat. § 15A-954(a)(4) (2015) ("The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that . . . [t]he defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.")

Defendant contends he was not taken before a magistrate, as required by N.C. Gen. Stat. § 15A-501(2), or advised of his right to communicate with friends as required by N.C. Gen. Stat. § 15A-501(5), without unnecessary delay.

The crash occurred at 2:37 a.m. Officer Cerdan arrived at the scene between 3:15 and 3:20 a.m. and conducted field sobriety testing on Defendant. Defendant was arrested without a warrant for driving while impaired and violation of his .04 BAC driver's license restriction.

Upon remand, the trial court made the following findings of fact in its amended order denying Defendant's motion to dismiss:

> 7. Officer Cerdan informed Sgt. Sloan of his findings and drove Defendant to CMC-Mercy hospital to have his blood drawn. Upon arrival at the hospital around 4:33 am, Officer Cerdan advised the Defendant of his rights. Defendant signed the rights form and did not ask to have a witness or an attorney present. A telephone was available to Defendant in the hospital room. His blood was drawn at 4:55 am. Defendant was examined by a physician and cleared. Cerdan collected the evidence and completed the discharge paperwork.
>
> 8. Two vials of blood were drawn from Defendant. One vial was tested by a chemical analyst and the second was

preserved for further testing if needed. Defendant has not requested that the second vial of blood be tested.

9. He was then taken to the Law Enforcement Center where they waited for the lead Detective Sammis to arrive and interview Defendant. Sammis arrived at about 5:52 a.m.

10. Detective Sammis began the interview with Defendant at 6:15 am by reading the Miranda rights form. Defendant initialed each right indicating that he understood, signed the waiver of rights form and agreed to make a statement without the presence of a lawyer. The interview concluded after an hour. Defendant was then charged with second degree murder and felony serious injury by vehicle.

11. Detective Sammis prepared the arrest affidavit, checked Defendant's criminal history and driving history. Officer Cerdan then transported Defendant to the Mecklenburg County jail for processing at 9:35 am. He was brought before a magistrate at approximately 11:11 am. Prior to seeing the magistrate, Defendant made a phone call to a friend. He did not ask the friend to come to the jail until after he knew the conditions of his release.

12. The magistrate set bond on each of the Defendant's charges except the second degree murder charge. The magistrate may have misconstrued the Bond policy of "no recommendation" on a second degree murder charge, as "no bond". The State concedes and the Court finds that the failure to set bond on the murder charge was a violation of NCGS Sec. 15A-533(b).

13. The Defendant had a first appearance hearing via video conference on November 29, 2011. Bond was set at $350,000 secured on the second degree murder case. He was represented by counsel at that hearing.

14. Defendant was released on bond several days after his arrest.

Based upon these findings, the trial court concluded in the amended order:

1. The Defendant was advised of his rights to have family, friends or an attorney present twice before he appeared

> before the Magistrate. He indicted [sic] at the hospital and when interviewed by Detective Sammis, that he understood his rights. He did not ask for a witness or an attorney. Defendant was not denied his right to consult with family, friends, or an attorney. There was no violation of NCGS § 15A-501(5);
>
> 2. The time spent in taking Defendant from the scene of the wreck to the hospital for medical assessment and blood draw, then the Law Enforcement Center where he was interviewed by a detective; and from there to the jail before being presented to the Magistrate did not constitute an unnecessary delay as to substantially violate Defendant's statutory right to be taken before a Magistrate without delay following his arrest at 4:00 a.m. There was no violation of NCGS § 15A-501(2), nor has Defendant demonstrated that he was prejudiced by the passage of time from his arrest until his appearance before the Magistrate.
>
> 3. While the Magistrate violated the Defendant's right to pre-trial release; the Defendant has failed to establish that he suffered irreparable prejudice as a result of the Magistrate's failure[.]

Defendant contends the relevant delay of time is nine hours, the period of time between the crash and his appearance before the magistrate. However, the pertinent time span is calculated between Defendant's arrest at approximately 4:00 a.m. and his appearance before a magistrate, which his approximately seven hours. *See* N.C. Gen. Stat. § 15A-501.

C. *Hill* and *Knoll*

Defendant argues this case is controlled by *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971). In *Hill*, the defendant was arrested for driving while impaired at approximately 11:00 p.m. and "was not permitted to telephone his attorney until after the breathalyzer testing and photographic procedures were completed and the warrant was served." *Id.* at 553, 178 S.E.2d at 466. The defendant called an attorney, who was also a relative. The attorney's request to see the defendant "was peremptorily and categatorically [sic] denied." *Id.* From the time of the defendant's arrest until he was released about 7:00 a.m. the following morning "only law enforcement officers had seen or had access to him." *Id.*

Our Supreme Court explained that, because "[i]ntoxication does not last," if a person accused of driving while impaired "is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest." *Id.* The Court concluded, "when an officer's blunder deprives a defendant of his only opportunity to obtain evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist." *Id.* at 555, 178 S.E.2d at 467.

The Court held the defendant

> was denied his constitutional and statutory right to communicate with both counsel and friends at a time when the denial deprived him of any opportunity to confront the State's witnesses with other testimony. Under these circumstances, to say that the denial was not prejudicial is to assume that which is incapable of proof.

Id. at 554, 178 S.E.2d at 466.

The General Assembly amended North Carolina's driving while impaired statutes after the Supreme Court's opinion in *Hill*. Under the current version of N.C. Gen. Stat. § 20-138.1(a)(2), a defendant may be convicted of DWI if his alcohol concentration, "at any relevant time after the driving," is .08 or more. N.C. Gen. Stat. § 20-138.1(a)(2) (2015). When *Hill* was decided, the statute provided that a 0.10 alcohol concentration merely created *an inference* of intoxication.

The amendment was addressed in *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988). The *Knoll* Court held, under the current statute, "denial of access is no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case" since an alcohol concentration of .08 is sufficient to show impairment, on its face, to convict the defendant. *Id*. at 545, 369 S.E.2d at 564 (citation omitted). The Court held "in those cases arising under NCGS § 20-138.1(a)(2), prejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief." *Id.*

D. Prejudice

The evidence showed and the trial court found that Defendant was arrested at the scene and transported to the hospital. At 4:33 a.m., he was advised of his rights and did not request the presence of a witness or attorney. A telephone was available to him. Two vials of blood were

drawn with Defendant's consent. One was preserved for further testing, if needed. Defendant did not request further testing of the blood sample. He was transported from the hospital, and arrived at the Law Enforcement Center at 5:21 a.m. to be interviewed. Defendant waived his *Miranda* rights, and agreed to make a statement without the presence of an attorney. Prior to his appearance before the magistrate, Defendant telephoned a friend, but did not ask the friend to come to the jail.

Unlike in *Hill*, the evidence and findings indicate Defendant was afforded multiple opportunities to have witnesses or an attorney present pursuant to N.C. Gen. Stat. § 15A-501(5), which he elected not to exercise. Defendant cannot now assert he was prejudiced to gain relief, either by the absence of a witness or attorney or by the time period between his arrest and appearance before a magistrate. *See Knoll*, 322 N.C. at 545, 369 S.E.2d at 564. Defendant's arguments are overruled.

V. Limitation on Defendant's Cross-Examination of Cooke

[2] Defendant argues the trial court erred by preventing him from cross-examining Christopher Cooke ("Cooke") regarding the contents of a verified complaint Cooke filed against Defendant and the estate of Ms. Siu on behalf of himself and Khai. We disagree.

A. Standard of Review

"The long-standing rule in this jurisdiction is that the scope of cross-examination is largely within the discretion of the trial judge, and his rulings thereon will not be held in error in the absence of a showing that the verdict was improperly influenced by the limited scope of the cross-examination." *State v. Woods*, 307 N.C. 213, 220-21, 297 S.E.2d 574, 579 (1982).

B. Exclusion of Evidence Intended to Show Bias

Cooke is Khai's father. Khai suffered extensive injuries during the crash, which included a severe and traumatic brain injury, a small spleen laceration, and ligament injuries and a bone fracture in his neck. Cooke was called by the State as a witness "simply to talk about some biographical information concerning [Ms.] Siu, and also Khai, and also to talk about [Khai's] injuries." The State filed a motion *in limine*, which sought to prevent Defendant from cross-examining Cooke concerning the contents of the verified civil complaint. The trial court granted the State's motion and prohibited Defendant from cross-examining Cooke regarding the allegations in the complaint, or about any bias that might result from Cooke's financial interest in Defendant's prosecution.

Cooke's testimony on direct examination was limited to factual information regarding his family and Khai's injuries. The State did not elicit any testimony from him regarding the cause of the crash. Cooke offered no testimony that would tend to sway the jury in deciding Defendant's guilt. " 'The trial judge may and should rule out immaterial, irrelevant, and incompetent matter.' " *State v. Jacobs*, 172 N.C. App. 220, 228, 616 S.E.2d 306, 312 (2005) (quoting *State v. Stanfield*, 292 N.C. 357, 362, 233 S.E.2d 574, 578 (1977)). Defendant has failed to show the trial court's decision to limit the scope of his cross-examination influenced the jury's verdict. *See Woods*, 307 N.C. at 220-21, 297 S.E.2d at 579. This argument is without merit and is overruled.

VI. Jury Instructions

A. Standard of Review

"Where the defendant preserves his challenge to jury instructions by objecting at trial, we review 'the trial court's decisions regarding jury instructions . . . *de novo*[.]' " *State v. Hope*, 223 N.C. App. 468, 471-72, 737 S.E.2d 108, 111 (2012) (quoting *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)).

Where a defendant fails to object to the challenged instruction at trial, any error is generally reviewed under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Proximate Cause and Intervening Negligence

[3] Defendant argues the trial court's instruction on proximate cause was erroneous, confused the jurors, and the trial court committed plain error by failing to instruct the jury on intervening negligence. We disagree.

The trial court instructed the jury in accordance with the applicable pattern jury instruction, as follows: "[T]he death of the victim was proximately caused by the unlawful act of the defendant done in a malicious manner." The trial court then gave the following supplemental instruction: "[T]he State must prove beyond *a* reasonable doubt only that the defendant's negligence was a proximate cause." (emphasis supplied). Defendant argues these two phrases are competing, and tend to suggest different formulations of the proof required of the State. Defendant contends the language of the supplemental instruction suggests to the jury that they not consider the impact of any negligence

on the part of Ms. Siu. Defendant acknowledges he did not request a jury instruction on intervening negligence.

In *State v. Bailey*, 184 N.C. App. 746, 646 S.E.2d 837 (2007), this Court explained the law of proximate cause and intervening negligence in criminal prosecutions. In that case, the defendant was convicted of felony death by motor vehicle. *Id.* at 747, 646 S.E.2d at 838. The State's evidence tended to show the defendant was traveling behind a vehicle driven by the decedent. The decedent had stopped her vehicle in the roadway. The defendant applied his brakes, was unable to stop, and his vehicle collided into the back of the decedent's vehicle. *Id.* A blood sample obtained from the defendant showed a blood alcohol content of 0.22. *Id.*

The defendant requested an instruction on the decedent's "contributory negligence." *Id.* at 748-49, 646 S.E.2d at 839. This Court explained:

> Intervening negligence in cases such as this is relevant as to whether defendant's actions were the proximate cause of the decedent's death. *State v. Harrington*, 260 N.C. 663, 666, 133 S.E.2d 452, 455 (1963). An instruction to that effect, if denied, would have warranted a new trial. *See State v. Hollingsworth*, 77 N.C. App. 36, 40, 334 S.E.2d 463, 466 (1985). Accordingly, this Court has granted a new trial where defendant requested an instruction on intervening negligence because the question of whether defendant's conduct was the proximate cause of death is a question for the jury. *Id.* In the instant case, however, defendant did not seek such an instruction. Moreover, the trial court accurately instructed the jury by stating that, " '[t]here may be more than one proximate cause of an injury. The State must prove beyond a reasonable doubt only that the defendant's negligence was *a* proximate cause.' " Accordingly, we find that the trial court did not err in denying defendant's requested instruction.

Id. at 749, 646 S.E.2d at 839.

The Court further explained:

> Even assuming [the decedent] was negligent, "[i]n order for negligence of another to insulate defendant from criminal liability, that negligence must be such as to break the causal chain of defendant's negligence; otherwise, defendant's culpable negligence remains a proximate cause, sufficient

> to find him criminally liable." *Hollingsworth*, 77 N.C. App. at 39, 334 S.E.2d at 465. In the instant case, [the decedent's] negligence, if any, would be, at most, a *concurring* proximate cause of her own death. *See id.* at 39, 334 S.E.2d at 466. This is especially true here, where the State's evidence tended to show that defendant's blood alcohol content was over twice the legal limit. This impairment inhibited defendant's ability to "exercise [] due care [and] to keep a reasonable and proper lookout in the direction of travel[.]" *Id.*

Id. at 749, 646 S.E.2d at 839-40 (emphasis in original).

While Defendant's counsel argued at various times that causation was an issue in this case, our review of the record does not demonstrate "the jury probably would have reached a different result" if the instruction on intervening negligence was given. *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Overwhelming evidence, including the testimonies of three eye witnesses, was presented to show Defendant drove through the red light, while grossly impaired and caused the crash. Our review of the record on appeal concludes the only evidence to hint Ms. Siu may have been negligent in causing the crash is Defendant's off-handed comment to Officer Cerdan prior to the blood draw, when he asked if Officer Cerdan "tested the person that ran the red light." Defendant has failed to show plain error by the absence of a jury instruction on intervening negligence.

Even presuming Ms. Siu was somehow negligent, "her negligence, if any, would be, at most, a *concurring* proximate cause of her own death." *Bailey*, 184 N.C. App. at 749, 646 S.E.2d at 839-40 (emphasis in original). The State's evidence tended to show that Defendant's blood alcohol content was over twice the legal limit. "This impairment inhibited defendant's ability to exercise due care and to keep a reasonable and proper lookout in the direction of travel." *Id.* (citation, quotation marks, and brackets omitted). The trial court's supplemental instruction on proximate cause was an accurate statement of the law. *See id.* at 749, 646 S.E.2d at 839.

C. Instruction on Felonious Serious Injury by Vehicle

[4] Defendant also argues the trial court erred by instructing the jury with regard to the charge of felonious serious injury by vehicle, as follows:

> And fifth, that the impaired driving by the defendant proximately, but unintentionally, caused the victim's serious injury. Proximate cause is a real cause, a cause without

> which the victim's serious injury would not have occurred. The defendant's act need not have been the last or nearest cause. It is sufficient if it concurred with some other cause acting at the same time which, in combination with it, proximately caused the victim's serious injury.

Defendant cites N.C. Gen. Stat. § 20-141.4(a4)(3) (2015), which states: "The commission of the offense . . . is *the* proximate cause of the serious injury." (emphasis supplied). Defendant asserts this language "forecloses the possibility of the state proving proximate cause in conjunction with some other concurrent cause." We disagree.

Defendant acknowledges in his brief this Court's previous rejection of this argument. *See State v. Leonard*, 213 N.C. App. 526, 530, 711 S.E.2d 867, 871 (2011) (defendant's operation of a motor vehicle under the influence of an impairing substance "need not be the only proximate cause of a victim's injury in order for defendant to be found criminally liable; a showing that defendant's action of driving while under the influence was one of the proximate causes is sufficient.") The trial court accurately instructed the jury in conformity with the law. This argument is without merit and is overruled.

VII. Exclusion of Evidence that the Child Victim was not Properly Restrained

[5] Defendant argues the trial court erred by denying his requests to allow evidence that Khai was not properly restrained in a child seat pursuant to N.C. Gen. Stat. § 20-137.1. We disagree.

A. Standard of Review

This Court reviews the trial court's decision to exclude evidence for an abuse of discretion. *State v. Cooper*, 229 N.C. App. 442, 227, 747 S.E.2d 398, 403-404 (2013).

B. Analysis

The statute cited by Defendant states, "Every driver who is transporting one or more passengers of less than 16 years of age shall have all such passengers properly secured in a child passenger restraint system or seat belt which meets federal standards applicable at the time of its manufacture." N.C. Gen. Stat. § 20-137.1(a) (2015). However, the law also provides, "Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section or as justification for the stop of a vehicle or detention of a vehicle operator and passengers."

N.C. Gen. Stat. § 20-135.2A(d) (2015). Furthermore, a child restraint system violation "shall not be evidence of negligence or contributory negligence." N.C. Gen. Stat. § 20-137.1(d)(4) (2015). Defendant's argument is without merit and is overruled.

VIII. Conclusion

Defendant elected not to exercise multiple opportunities to have witnesses or an attorney present after his arrest pursuant to N.C. Gen. Stat. § 15A-501(5). Defendant cannot demonstrate he was irreparably prejudiced by the absence of a witness or attorney or by the time period, which elapsed between his arrest and appearance before a magistrate to warrant dismissal of his charges.

Cooke offered no testimony that would tend to sway the jury in deciding Defendant's guilt. Defendant has failed to show the trial court committed prejudicial error by not allowing Defendant to cross-examine Cooke regarding the contents of his civil complaint against Defendant and Ms. Siu to show bias.

The trial court's jury instructions on proximate cause were accurate and did not mislead the jury. Defendant has failed to show the trial court committed plain error by failing to give an instruction on intervening negligence.

The trial court did not abuse its discretion by not allowing evidence that Khai was not properly restrained in a child seat. Defendant received a fair trial, free from prejudicial errors he argued. *It is so ordered.*

NO PREJUDICIAL ERROR.

Judges McCULLOUGH and DILLON concur.

Judge McCULLOUGH concurred in this opinion prior to 24 April 2017.

STATE v. HARRIS

[253 N.C. App. 322 (2017)]

STATE OF NORTH CAROLINA
v.
JEROME HARRIS, DEFENDANT

No. COA16-874

Filed 2 May 2017

1. Evidence—witness interview video—past recorded recollection hearsay exception—corroboration

The trial court did not err in a second-degree murder and possession of a firearm by a felon case by allowing the State to introduce a video of a witness's interview by law enforcement and to play the video for the jury. The video was a "past recorded recollection" hearsay exception and also served as corroborative evidence substantiating witness testimony.

2. Jury—supplemental jury instructions—continued deliberations after inability to reach verdict

The trial court did not commit plain error in a second-degree murder and possession of a firearm by a felon case by failing to give all supplemental jury instructions for a deadlocked jury. The trial court's instructions to continue deliberations did not coerce the jury into reaching its verdict.

Appeal by defendant from judgment entered 11 December 2015 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Marc X. Sneed, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

BERGER, Judge.

Jerome Harris ("Defendant") appeals from judgment entered following his conviction for second degree murder and possession of a firearm by a convicted felon. Defendant contends the trial court erred (1) by allowing the State to introduce a video of a witness' interview by law enforcement into evidence, both substantively and corroboratively, and to play the video for the jury; and (2) by giving supplemental

jury instructions urging the jurors to continue their deliberations when it was communicated to the trial court that they were unable to agree upon a verdict.

After review, we disagree with Defendant on his first assignment of error and hold that the trial court did not commit error in allowing the State's video interview evidence to be played for the jury, first as a 'past recorded recollection' exception to hearsay, and second as corroborative evidence substantiating their witness' testimony. We agree with Defendant on his second assignment of error that the trial court erred by giving some, but not all, of the supplemental jury instructions required by statute if it appears to the judge that the jury has been unable to agree upon a verdict. However, because this was unpreserved error and the trial court's instructions did not coerce the jury into reaching its verdict, it did not rise to the level of plain error. For these reasons, Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial that tended to show the following chain of events led to the death of Corey Jackson ("Jackson"). Donivan Bridges ("Bridges"), a close friend of Defendant for approximately 12 years, testified that he, Jackson, and Defendant were at a cookout together on April 20, 2014. At the cookout, Jackson and Defendant began to argue when Jackson told Defendant, "We used to take your drugs and we used to beat you up whenever you was on the streets." Jackson's comment was made in the presence of Defendant's girlfriend, Africa Ledbetter ("Ledbetter"), and their children. After this verbal exchange, Defendant expressed anger to Bridges at this insult and his intent to shoot Jackson that day. Defendant also asked Bridges about acquiring a gun. Defendant did not know where his gun was located because Ledbetter had hidden it from him.

Tyshia Wilson ("Wilson") testified that on April 21, 2014, she noticed that Jackson seemed agitated and anxious when she saw him at the home of Cora Bost ("Bost"), Wilson's mother. When Wilson asked Jackson why he was anxious, he said that he was in the middle of a confrontation with Defendant and wanted it resolved that day. Jackson let Wilson know about the confrontation so that he "wouldn't get jumped," and also said that he wanted to fight Defendant in the parking lot their adjacent apartments shared.

Once Jackson, Wilson, and others left Bost's home and returned to Defendant and Jackson's apartment complex, Defendant was found pacing outside as he talked on his telephone. Jackson challenged

Defendant to a fight, but Defendant said he did not have time to fight. Bost testified that Jackson, in reference to a previous domestic incident between Defendant and Ledbetter in which police were called, said to Defendant, "You must be still mad because you think my girl called the cops on you when you was beating [Ledbetter]."

Defendant continued his telephone conversation and requested the person to whom he was speaking to bring him a gun. Jackson continued to call Defendant inflammatory names as he challenged him to fight, but Defendant continued to decline Jackson's invitation. Later that day, Jackson informed his wife, Tyaisha Smalley ("Smalley"), about his confrontation with Defendant and how Defendant had accused Jackson of trying to "holler at" Ledbetter. Jackson denied having ever pursued any kind of relationship with Ledbetter.

Several days passed, and on April 24, 2014, Smalley and her son Christian returned to the apartment they shared with Jackson. Jackson had previously sent Smalley a text message at approximately 2:40 p.m. saying that he was at their apartment cleaning. When Smalley and Christian arrived, Smalley paused briefly outside to speak with Ledbetter's parents who were sitting on Defendant and Ledbetter's front porch. Christian entered the apartment first, and came back outside to tell Smalley that Jackson was lying on the floor of their living room, face down and unresponsive. Ledbetter's stepfather called for police and an ambulance.

As part of law enforcement's initial investigation, Raleigh Police Detective Brian Neighbors ("Detective Neighbors") interviewed Ledbetter's 13-year-old son, Xavier Gibbes ("Gibbes"), on that same day, April 24. Gibbes informed Detective Neighbors during this interview that he had heard a gunshot at approximately 2:45 to 3:00 p.m. earlier that day in the vicinity of Jackson's apartment, and several seconds later had observed Defendant walking away from the apartment with a jacket in his hand.

When Bridges returned to his apartment on April 24 and saw the ongoing investigation at Jackson's apartment, he called Defendant because of the conversation he and Defendant had the previous day. During this conversation, Defendant asked whether the police were looking for him, and admitted that "he [had] shot [Jackson] and thought he hit him at least once". Bridges was interviewed by Raleigh Police Detective Eric Emser ("Detective Emser") on April 24, and he conveyed the content of his conversation with Defendant to Detective Emser.

Dr. Lauren Scott ("Dr. Scott") of the Office of the Chief Medical Examiner performed an autopsy of Jackson on April 25, 2014. Dr. Scott testified about the autopsy, finding that Jackson had suffered four gunshot wounds. Two of these gunshot wounds entered Jackson's back and were determined to be fatal.

Defendant was arrested on the morning of April 25, 2014. Following his arrest, Defendant was interviewed by Raleigh Police Detective Zeke Morse ("Detective Morse"). During the interview, Defendant informed Detective Morse where he would be able to find the weapon with which he had shot Jackson.

At trial, Defendant freely, voluntarily, and understandingly elected to remain silent and not present any evidence on his own behalf, after consultation with his counsel.

Procedural Background

Defendant was indicted by a Wake County Grand Jury on June 2, 2014, for possession of a firearm by a convicted felon in violation of N.C. Gen. Stat. § 14-415.1, and first degree murder in violation of N.C. Gen. Stat. § 14-17. These charges were joined for trial as they arose from the same acts of Defendant. Defendant was tried before a jury beginning on December 7, 2015, in Wake County Superior Court, the Honorable Michael R. Morgan presiding. The jury returned verdicts finding Defendant guilty of possession of a firearm by a convicted felon, for which Defendant was sentenced to a term of 17 to 30 months, and guilty of second degree murder, for which he was sentenced to a term of imprisonment of 328 to 406 months; the sentence terms to run consecutively. Defendant gave oral notice of appeal.

Analysis

Defendant has two assignments of error asserted in this appeal. His first assignment contests the introduction of a video interview conducted by Detective Neighbors of Gibbes into the State's evidence, and allowing said interview to be played twice for the jury. His second assignment of error, albeit unpreserved at trial, challenges supplemental jury instructions given by the trial court when the jury communicated that it was unable to reach a verdict after three hours of deliberation. We take each in turn.

I. Video Recording of Witness' Interview

[1] By his first assignment of error, Defendant contends that the trial court erred by allowing the State to twice play for the jury a video

recording of its witness being interviewed by law enforcement. Defendant argues that it was error for the trial court to allow the video interview to be introduced as evidence both substantively, and thereafter corroboratively. In other words, it should have failed substantively, and therefore failed corroboratively. We disagree.

Initially, we must note that "[e]vidence of an out-of-court statement of a witness, related by the in-court testimony of another witness, may be offered as substantive evidence[1] or offered for the limited purpose of corroborating the credibility of the witness making the out-of-court statement.[2]" *State v. Ford*, 136 N.C. App. 634, 640, 525 S.E.2d 218, 222 (2000) (footnotes in original). "Although the better practice calls for the party offering the evidence to specify the purpose for which the evidence is offered, unless challenged there is no requirement that the purpose be specified." *Id.* "If the offering party does not designate the purpose for which the evidence is offered, the evidence is admissible if it qualifies either as corroborative evidence or competent substantive evidence." *Id.* (citing *State v. Goodson*, 273 N.C. 128, 129, 159 S.E.2d 310, 311 (1968); *State v. Chandler*, 324 N.C. 172, 182, 376 S.E.2d 728, 735 (1989)).

A. Introduction of Recording as Hearsay Exception

Defendant first argues that the trial court erred in allowing the video interview to be introduced as substantive evidence and played for the jury when the State's witness, Gibbes, was unable to recall any of the statements he made to Detective Neighbors soon after Defendant had shot and killed Jackson. Defendant argues that the State introduced the video interview pursuant to Rule 612 of the North Carolina Rules of Evidence as a 'present recollection refreshed', and in allowing it to do so, the trial court erred. However, in light of the testimony of Gibbes, the arguments of counsel, and the ruling of the trial court, the evidence was properly introduced pursuant to Rule 803(5) as a hearsay statement that fits within an exception to exclusion. Therefore, as shown below, the trial court did not err, and this portion of this alleged error is overruled.

At the time evidence is admitted, exceptions to the admission must generally be preserved by counsel with an objection. N.C. Gen. Stat.

---

1. The evidence would qualify as substantive evidence if it was offered for the truth of the matter asserted and qualified as an exception under our hearsay rules. N.C. Gen. Stat. § 8C–1, Rule 803 (1999).

2. If offered simply as corroborative evidence and admitted for this limited purpose, the evidence does not constitute hearsay evidence because it is not offered to prove the truth of the prior out-of-court statement. As such this evidence does not qualify as an exception to the hearsay rule.

§ 8C–1, Rule 103; N.C.R. App. P. 10(a)(1). "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (citing N.C.R. App. P. 10(b)(1)).

The specific grounds for objection raised before the trial court must be the theory argued on appeal because "the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court]." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Furthermore, when counsel objects to the admission of evidence on only one ground, he or she fails to preserve the additional grounds for appeal, unless plain error is specifically and distinctly argued on appeal. *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995) (citing N.C.R. App. P. 10(c)(4)). For this issue, Defendant has not argued plain error. Therefore, we only address the grounds under which the contested admission of evidence was objected, as any other grounds have been waived.

The admission of evidence alleged to be hearsay is reviewed *de novo* when preserved by an objection. *State v. Wilson*, 197 N.C. App. 154, 159, 676 S.E.2d 512, 515 (2009). Unless there is an evidentiary rule to the contrary, assignment of error to the admission of evidence is waived on appeal if no objection is raised to the trial court. *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011). Furthermore, unless a defendant proves that a different result would have been reached at trial absent the error, evidentiary errors are harmless. *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001) (citing *State v. Campbell*, 133 N.C. App. 531, 540, 515 S.E.2d 732, 738 (1999)).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2015). Hearsay may not be admitted into evidence, "except as provided by statute or by [the evidentiary] rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2015). These evidentiary rules provide exceptions for certain hearsay evidence to not be excluded if the statement fits in certain categories. N.C. Gen. Stat. § 8C-1, Rule 803 (2015). One such statement that will not be excluded by the hearsay rule is "[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly." N.C. Gen. Stat. § 8C-1, Rule 803(5). This is considered a 'past recollection recorded', and,

"[i]f admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." *Id.*

In the case *sub judice*, Defendant argues that the trial court permitted the jury to hear the recording of Gibbes' interview by Detective Neighbors under Rule 612(a) of the North Carolina Rules of Evidence. Defendant further argues that the trial court erred by allowing the State to play this recording, because under Rule 612 Defendant must be the party choosing whether or not the recording will be played for the jury.

Rule 612 provides for the use of a writing or object to be used to refresh the witness' memory. N.C. Gen. Stat. § 8C-1, Rule 612 (2015). This 'present recollection refreshed' writing or object may be used by the witness to refresh his memory, but the "adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying". *Id.* Furthermore, this adverse party is "entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness". *Id.*

However, it was neither explicitly stated whether the State was seeking to introduce the video into evidence as a hearsay exception pursuant to Rule 803(5) or as a 'present recollection refreshed' pursuant to Rule 612, nor was it stated that the trial court was allowing the video's introduction into evidence pursuant to either of these two rules. Therefore, we must distinguish between a writing that is offered as a 'past recollection recorded' and one that is offered as a 'present recollection refreshed' because the admissibility requirements are critically different.

"Before a past recollection recorded can be read into evidence, certain foundational requirements must be met." *State v. Harrison*, 218 N.C. App. 546, 551-52, 721 S.E.2d 371, 376 (2012). This Court, in *State v. Love*, 156 N.C. App. 309, 576 S.E.2d 709 (2003), explained that

> [i]n order to admit 'recorded recollection' pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(5), the party offering the recorded recollection must show that the proffered [evidence] meets three foundational requirements: (1) The [evidence] must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The [evidence] must be shown to have been made by the declarant or, if made by one other than the declarant,

> to have been examined and adopted . . . when the matters were fresh in [his or her] memory.

Id., 156 N.C. App. at 314, 576 S.E.2d at 712 (brackets omitted).

In contrast,

> [u]nder present recollection refreshed the witness' memory is refreshed or jogged through the employment of a writing, diagram, smell or even touch, and he testifies from his memory so refreshed. Because of the independent origin of the testimony actually elicited, the stimulation of an actual present recollection is not strictly bounded by fixed rules but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present.
>
> [*State v. Gibson*, 333 N.C. 29, 50, 424 S.E.2d 95, 107 (1992) *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993)]. Because "the evidence is the testimony of the witness at trial, whereas with a past recollection recorded the evidence is the writing itself," "the foundational questions raised by past recollection recorded are never reached." *Id.* The relevant test, then, "is whether the witness has an independent recollection of the event and is merely using the memorandum to refresh details or whether the witness is using the memorandum as a testimonial crutch for something beyond his recall." *State v. York*, 347 N.C. 79, 89, 489 S.E.2d 380, 386 (1997).

Harrison, at 552, 721 S.E.2d at 376.

The testimony of Gibbes leading up to the introduction of the video evidence to the jury showed that this evidence was necessary "as a testimonial crutch for something beyond his recall." *See York*, at 89, 489 S.E.2d at 386. During direct examination of Gibbes by the State, the following pertinent exchanges illustrated Gibbes' lack of recall:

> [The State]: All right. Now, what was the detective talking to you about?
>
> [Gibbes]: I don't remember.
>
> [The State]: You don't remember?
>
> [Gibbes]: Huh-uh. I really don't…

And:

[The State]: Do you recall telling the detective that?

[Gibbes]: No.

And:

[The State]: Okay. You don't recall this detective that's depicted with you looking at this piece of paper in State's Exhibit 99, this being the sketch and you indicating where you were when you heard the gunshot and two or three seconds later, you see [Defendant] walking away carrying a jacket?

[Gibbes]: No, I really don't.

[The State]: Okay. Did you tell the detective that?

[Gibbes]: No.

[The State]: Tell us everything – how long did you stay at the Raleigh Police Department?

[Gibbes]: I really don't know. That was a year ago. You can't expect me to recall that.

Following these exchanges, the State asked Gibbes whether viewing the video interview with Detective Neighbors would be helpful. Gibbes responded, "I mean, whatever floats your boat." Then, when Defendant was asked by the trial court whether or not he objected to the introduction of the video evidence to the jury, Defendant's counsel initially had no objection, but then changed his mind and entered an objection.

The objection lodged by Defendant before the introduction of the contested evidence is consistent with an objection to the introduction of 'past recollection recorded' evidence, particularly the second foundational requirement enunciated in *Love*: "[t]he declarant must now have an insufficient recollection as to such matters…" *Love*, 156 N.C. App. at 314, 576 S.E.2d at 712. Defendant's counsel objected "because of the testimony of the witness saying he did not remember." The trial court responded in overruling Defendant's objection that "[t]he aspect of his saying he did not remember is a demonstration of his recollection being exhausted", i.e., insufficient recollection as to such matters.

As the pertinent parts of the testimony above show, Gibbes had insufficient recollection as to the information he had conveyed to

Detective Neighbors when those matters were fresh in his memory. Had Defendant's counsel objected to the introduction of the evidence generally, or objected to any other foundational issues specifically, those objections could be reviewed by this Court. However, Defendant has failed to preserve other grounds for review and he is not permitted "to swap horses between courts." *Weil*, at 10, 175 S.E. at 838. Therefore, based upon Defendant's counsel's objection, and the concomitant scope of review permitted within this Court, we must conclude that the trial court did not err in allowing the video of this interview to be played for the jury during Gibbes' testimony as 'past recollection recorded' substantive evidence.

B. Introduction of Recording as Corroborative Evidence

Defendant next argues, within this same issue, that the introduction of the same video interview as corroborative evidence during the testimony of Detective Neighbors was allowed in error. Defendant argues this was error because, if the video was improperly introduced during Gibbes' testimony as substantive evidence, it should not have been introduced during Detective Neighbors' testimony as corroborative evidence. As shown above, the introduction of the video as substantive evidence was not error; therefore, Defendant's argument fails to show why it could not have been introduced as corroborative evidence at a later point in the trial.

Furthermore, and most dispositive, Defendant did not object to the second introduction of this evidence under any issues pertaining to corroboration. Defendant's counsel, in giving his grounds for objection, stated, "Judge, I'm going to object to reshowing this, especially when the State's witness who is being interviewed [in the video] is not here that that [*sic*] we can call and cross-examine about what happened." As stated above, and emphasized here, the specific grounds for objection raised before the trial court must be the theory argued on appeal because "the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court]." *Weil*, at 10, 175 S.E. at 838. Furthermore, when counsel objects to the admission of evidence on only one ground, he or she fails to preserve the additional grounds for appeal, unless plain error is specifically and distinctly argued on appeal. *Frye*, at 496, 461 S.E.2d at 677 (citing N.C.R. App. P. 10(c)(4)). Again, as in the first part of this issue, plain error has not been argued.

At trial, the State questioned Detective Neighbors extensively about the interview recorded in the video, specifically detailing the Detective's many questions asked and Gibbes' responses given, along with the

circumstances surrounding the interview. When viewing the introduction into evidence of the video interview, especially in the context of Detective Neighbors' testimony, the video interview was played for the jury to corroborate Detective Neighbors' prior testimony about the interview, not to corroborate any of Gibbes' previous testimony.

> Corroboration is the process of persuading the trier of the facts that a witness is credible. We have defined "corroborate" as "to strengthen; to add weight or credibility to a thing by additional and confirming acts or evidence." Prior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached. However, the prior statement must in fact corroborate the witness' testimony.
>
> In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. Our prior statements are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence. However, the witness's prior statements as to facts not referred to in his trial testimony and not tending to add weight or credibility to it are not admissible as corroborative evidence. Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.

State v. Locklear, 172 N.C. App. 249, 256, 616 S.E.2d 334, 339 (2005) (quoting *State v. Ramey*, 318 N.C. 457, 468-69, 349 S.E.2d 566, 573-74 (1986) (internal citations and quotations omitted)) (emphasis removed).

Detective Neighbors testified in elaborate detail about his interview with Gibbes. The State methodically questioned Detective Neighbors about his interviewee, Gibbes, as well as the responses Gibbes gave surrounding the death of his neighbor. Detective Neighbors testified to the detailed chronological order of Gibbes' explanation of what he had witnessed. Thereafter, the State requested that the video interview be played for the jury to corroborate Detective Neighbors' testimony about the interview. There may or may not have been inconsistencies between Detective Neighbors' testimony and the video interview, and there may

or may not have been facts mentioned in one but not the other, but these were for the jury to consider and weigh. *See Id.* The statements made in the video interview were admissible as corroborative evidence. *See State v. Higginbottom*, 312 N.C. 760, 768, 324 S.E.2d 834, 840 (1985), *superseded by statute on other grounds as stated in State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998) ("It is not necessary that evidence prove the precise facts brought out in a witness's testimony before that evidence may be deemed corroborative of such testimony and properly admissible." *citing State v. Burns*, 307 N.C. 224, 297 S.E.2d 384 (1982)).

"The jury could not be allowed to consider this evidence for any other purpose [but corroboration], however, and whether it in fact corroborated the [Detective]'s testimony was, of course, a jury question." *Locklear*, at 257, 616 S.E.2d at 340 (citation and quotation marks omitted). The trial court did not err in allowing the video interview be played for the jury for the purpose of corroborating Detective Neighbors' testimony, and, therefore, this portion of Defendant's assignment of error is overruled.

II. Supplemental Jury Instruction

[2] Next we address Defendant's argument that a new trial is required because he was deprived of his fundamental right to a properly instructed jury. We disagree with his contention that the supplemental jury instruction, given by the trial court in response to the jury's communication that it was "stuck" during its deliberation, had a probable impact on the jury's verdict or improperly coerced the jury to reach a verdict. Therefore, this alleged error was not prejudicial and we decline to grant Defendant a new trial.

Defendant did not object at trial to the instructions assigned as error. "Therefore, our review as to these instructions is limited to a review for plain error." *State v. Evans*, 346 N.C. 221, 225, 485 S.E.2d 271, 273 (1997) (citing *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)).

Our Supreme Court reaffirmed their holding in *State v. Odom*, and further clarified how the plain error standard of review applies on appeal to unpreserved instructional error, in *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012):

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. To show that an error was fundamental, a defendant must establish prejudice – that, after examination of the entire record,

> the error "had a probable impact on the jury's finding that the defendant was guilty." *See id.* (citations and quotation marks omitted); *see also* [*State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)] (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be "applied cautiously and only in the exceptional case," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting [*U.S. v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)]).

Lawrence, at 518, 723 S.E.2d at 334. "[E]ven when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *Odom*, at 660-61, 300 S.E.2d at 378 (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)).

After approximately three hours of deliberations, the trial court received a note from the jury indicating that "they ha[d] a split of 11 to 1." Neither the State, nor Defendant, objected to the trial court's "inclination to give them what is colloquially known as the dynamite charge, which would have them to be urged to do what they can to arrive at a unanimous verdict."

Once the jury was present in the courtroom, the trial court stated:

> By virtue of your most recent note that's been passed to me, your foreperson informs me that you have so far been unable to agree upon a verdict. The Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and to reconcile your differences, if you can, without the surrender of conscientious convictions. But no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors, or for the mere purpose of returning a verdict.

Once again, neither party objected to the supplemental instructions after it was given. The trial court then excused the jury to allow their deliberations to continue.

Defendant contends that this instruction was given in violation of N.C. Gen. Stat. § 15A-1235 (2015), which contains guidelines for instructing a deadlocked jury. Pursuant to N.C. Gen. Stat. § 15A-1235,

> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> > (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
> >
> > (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
> >
> > (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
> >
> > (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C. Gen. Stat. § 15A-1235.

"Whenever the trial judge gives a deadlocked jury any of the instructions authorized by N.C.G.S. § 15A-1235(b), he must give all of them." *State v. Aikens*, 342 N.C. 567, 579, 467 S.E.2d 99, 106 (1996) (citation omitted). Defendant argues in his brief that the trial court's supplemental

instruction omitted the substance of N.C. Gen. Stat. § 15A-1235(b)(1) and (2), and entirely omitted (b)(3). However, "[t]he purpose behind the enactment of N.C.G.S. § 15A-1235 was to avoid coerced verdicts from jurors having a difficult time reaching a unanimous decision." *Evans*, 346 N.C. at 227, 485 S.E.2d at 274 (citing *State v. Williams*, 339 N.C. 1, 39, 452 S.E.2d 245, 268 (1994), *overruled on other grounds by State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997) *cert. denied*, __ U.S. __, 133 L.Ed.2d 61 (1995)).

In *State v. Evans*, as in the case *sub judice*, the jurors were admonished not to compromise or surrender their conscientious or honest convictions for the mere purpose of returning a verdict. *Evans*, 346 N.C. at 227, 485 S.E.2d at 274. "The substance of these instructions was to ask the jury to continue its deliberations, and the instructions were not coercive." *Id.* Our Supreme Court specifically noted in *Evans* "that the effect of the instructions was not so coercive as to impel defendant's trial counsel to object to the instructions." *Id.* (quoting *State v. Peek*, 313 N.C. 266, 272, 328 S.E.2d 249, 253 (1985)). Defendant's counsel here did not object to the trial court's supplemental instructions when they were given, and, as in *Evans*, the trial court's instructions were not coercive and any error was not fundamental. "[A]fter examination of the entire record, the error [could not be said to have] 'had a probable impact on the jury's finding that the defendant was guilty.' " *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). This was not plain error.

While the failure of the trial court to give the full instructions as directed by N.C. Gen. Stat. § 15A-1235 did not rise to the level of plain error, we must clarify that at the time the instruction was given, the trial court should reasonably have believed that the jury was deadlocked. Because the trial court gave some of the instructions, but not all of them, it did commit error. However, this error does not automatically entitle Defendant to a new trial because, as our Supreme Court has recognized, " 'every variance from the procedures set forth in the statute does not require the granting of a new trial.' " *Williams*, 315 N.C. at 327-28, 338 S.E.2d at 86 (quoting *Peek*, 313 N.C. at 271, 328 S.E.2d at 253); *See also State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980).

Reading the instructions as a whole, and the context in which they were given, the trial court's supplemental instructions neither forced a verdict nor contained elements of coercion, but merely served as a catalyst for further deliberations. Defendant has failed to show how the instructions given could be reasonably interpreted as coercive, and failed to establish plain error. Therefore, because the instructional

mistake had no probable impact on the jury's finding that Defendant was guilty, we conclude that it was not prejudicial error.

Conclusion

The trial court did not err in allowing the State to introduce into evidence the video interview of Gibbes by Detective Neighbors, either substantively as a 'past recollection recorded' exception to hearsay, or corroboratively to substantiate Detective Neighbors' testimony. While the trial court did err in failing to give the full supplemental jury instructions required by N.C. Gen. Stat. § 15A-1235, Defendant will receive no relief from this error as it was neither plain nor prejudicial.

NO PREJUDICIAL ERROR.

Judges CALABRIA and HUNTER, JR concur.

STATE OF NORTH CAROLINA
v.
ROBERT HAROLD JOHNSON

No. COA16-527

Filed 2 May 2017

1. Jury—verdict—unanimity—multiple counts—instructions

There was a unanimous verdict in a case involving multiple charges and multiple counts rising from the sexual abuse of defendant's stepson. Although defendant contended that the organization of the offenses in the instructions by geographic location did not sufficiently identify the multiple offenses, the State presented evidence of offenses in each of the locations identified, defendant did not object to the instructions or the verdict sheets, and there was no indication that the jury was confused.

2. Sexual Offenders—lifetime registration—findings

A lifetime order to register as a sexual offender was remanded for proper findings where defendant was convicted of sexual offense with a child and sexual activity by a substitute parent and the trial court found that the offenses were reportable and aggravated. Defendant acknowledged on appeal that he was convicted of reportable offenses but challenged the findings that he was convicted of an aggravated offense. The sexual offenses here

may or may not involve the penetration statutorily required for an aggravated offense.

3. Satellite-Based monitoring—reasonable search—no determination

An order for lifetime satellite-based monitoring was reversed and remanded where the trial court did not make the reasonableness determination mandated by the U.S. Supreme Court in *Grady v. N.C.*, __U.S.__, 191 L.Ed. 459 (2015).

Appeal by defendant from judgments entered 3 December 2015 by Judge Michael D. Duncan in Watauga County Superior Court. Heard in the Court of Appeals 17 November 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anita LeVeauz, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

TYSON, Judge.

Robert Harold Johnson, ("Defendant") appeals from judgments entered upon his convictions for first degree sex offense with a child and sex offense by a substitute parent. We find no error in part, and reverse in part and remand to the trial court to issue correct findings and orders regarding sex offender registration and satellite-based monitoring ("SBM") requirements.

I. Background

Defendant was arrested and a Watauga County Grand Jury indicted Defendant on three counts of sexual offense with a child, three counts of sexual activity by a substitute parent, and three counts of taking indecent liberties with a child. The charges were spread among three identical superseding indictments dated 5 January 2015, each of which contained one count of each offense.

Prior to jury selection, the State voluntarily dismissed the three counts of indecent liberties with a child. The remaining charges for sexual offense with a child and sexual activity by a substitute parent were joined for trial without objection.

Evidence presented by the State at trial tended to show Defendant forced his wife's ten-year-old son to perform fellatio on him, when Defendant was supposed to be taking the juvenile to school and at

other times inside and outside the juvenile's grandparents' house, where Defendant and the juvenile lived.

On 3 December 2015, the jury returned verdicts finding Defendant guilty of all six charges—three counts of sex offense with a child and three counts of sex activity by a substitute parent. Based upon the verdicts, the trial court entered three separate judgments corresponding to the indictments, with one count of each offense included in each judgment. Defendant received three consecutive sentences of 300 to 420 months imprisonment. The court further ordered that upon Defendant's release from prison, Defendant shall register as a sex offender for life and enroll in SBM for the remainder of his life. Defendant filed notice of appeal on 11 December 2015.

II. Jurisdiction

Jurisdiction lies in the Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015) and N.C. Gen. Stat. § 15A-1444(a) (2015).

III. Issues

On appeal, Defendant raises the following three issues: whether the trial court erred by (1) allowing the jury to return guilty verdicts that were potentially less than unanimous by failing to adequately detail the incident of sex offense alleged in a particular indictment; (2) ordering lifetime sex offender registration based on a finding that Defendant was convicted of an aggravated offense; and (3) ordering lifetime SBM without a determination that the program was a reasonable search.

IV. Unanimous Verdicts

[1] In order to clarify and better distinguish sexual offenses, many of the sexual offense statutes were reorganized, renamed, and renumbered by the General Assembly following this Court's recommendation in *State v. Hicks*, 239 N.C. App. 396, 768 S.E.2d 373 (2015). *See* 2015 N.C. Sess. Laws 181 (effective 1 Dec. 2015). Those changes became effective 1 December 2015, but apply only to the prosecution of offenses committed after the effective date. *See* 2015 N.C. Sess. Laws. 181 sec. 48. We reference the previous version of the statutes in effect at the time the offenses in this case were committed.

The three superseding indictments in this case were identical, each charging one count of sex offense with a child in violation of N.C. Gen. Stat. § 14-27.4A(a) and one count of sexual activity by a substitute parent in violation of N.C. Gen. Stat. § 14-27.7(a) within the same period of time and without details distinguishing between the incidents. The

evidence presented to the jury at trial included evidence of multiple sexual interactions between Defendant and the juvenile.

During the charge conference, the court inquired of counsel how to differentiate between the offenses in the charge to the jury. In response, the prosecutor suggested that the offenses be differentiated based on where each offense was alleged to have occurred— "inside Dovie Evans' house," "outside of Dovie Evans's [sic] house," and "at the end of a dirt road near Dovie Evans's [sic] house." The defense objected to the prosecutor's suggestion contending the locations were "a little too broad and open-ended." Although the defense suggested more specific instructions, the defense declined to offer specific suggestions.

After considering options to make the instructions more specific, the court noted Defendant's objection and decided it would differentiate between the offense based on where the offenses were alleged to have occurred as follows: "inside Dovie Evans' house," "outside Dovie Evans' house, but on Dovie Evans' property[,]" and "at the end of a dirt road off Snyder Branch road near Dovie Evans' house." The jury was then instructed on the sex offense with a child and sexual activity by a substitute parent offenses with the offenses differentiated by where they were alleged to have occurred, as decided during the charge conference. The defense did not object to the instructions. The verdict sheets provided to the jury also differentiated between the offenses by where each offense was alleged to have occurred. The defense also did not object to the verdict sheets.

Defendant challenges the entry of judgements on convictions for the offenses purportedly occurring "inside Dovie Evans' house" and "outside Dovie Evans' house but on Dovie Evans' property" in file numbers 14 CRS 1235 and 14 CRS 50591. Defendant contends the trial court erred in failing to sufficiently identify the incidents constituting the offenses and, therefore, deprived him of his right to unanimous jury verdicts.

A. Standard of Review

"The North Carolina Constitution and North Carolina Statutes require a unanimous jury verdict in a criminal jury trial." *State v. Lawrence*, 360 N.C. 368, 373-74, 627 S.E.2d 609, 612 (2006) (citing N.C. Const. art. 1, § 24; N.C. Gen. Stat. § 15A–1237(b)). Although Defendant did not object to the instructions or the verdict sheets provided to the jury, "where the [alleged] error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel." *State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330

(2009) (citation omitted). "This is so because 'the right to a unanimous jury verdict is fundamental to our system of justice.' " *State v. Gillikin*, 217 N.C. App. 256, 261, 719 S.E.2d 164, 168 (2011) (quoting *Wilson*, 363 N.C. at 486, 681 S.E .2d at 331).

B. Analysis

Defendant argues that with respect to both the sexual assault purported to have occurred inside the house and the sexual assault purported to have occurred outside the house but on the property, "the jury heard testimony about two distinctly different incidents involving a sex offense and the jury could have returned its verdicts of guilt without being unanimous that the Defendant committed a particular offense." The State argues that the indictments were sufficient to give Defendant notice of the charges, that there was sufficient evidence to support convictions on the charged offenses in each location, and that the jury instructions were clear.

Upon review of both parties' arguments, it is evident the State's response does not directly address Defendant's argument. Defendant's argument asserts the evidence presented at trial showed multiple, distinct instances of sexual assault occurring inside the house and multiple, distinct instances of sexual assault occurring outside the house, but on the property. Because the jury was not provided more details in the instructions or on the verdict sheets, Defendant contends he is not certain whether the jury unanimously found Defendant guilty based on the same incidents. We disagree.

"To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged." *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982). As this Court has explained,

> [t]here is no risk of a nonunanimous verdict . . . where the statute under which the defendant is charged criminalizes "a single wrong" that "may be proved by evidence of the commission of any one of a number of acts . . .; [because in such a case] the particular act performed is immaterial."

State v. Petty, 132 N.C. App. 453, 460, 512 S.E.2d 428, 433 (quoting *State v. Hartness*, 326 N.C. 561, 566-67, 391 S.E.2d 177, 180 (1990)), *appeal dismissed and disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999). In *Petty*, this Court analyzed the first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a) and held the "gravamen, or gist, is to criminalize the performance of a sexual act with a child." *Id.* at 461-62, 512

S.E.2d at 434. The statute "does not create disparate offenses, rather it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown." *Id.* at 462, 512 S.E.2d at 434. Thus, instructions that a defendant could be found guilty of first degree sex offense based on different sexual acts was not error. *Id.* at 462-63, 512 S.E.2d at 434. The analysis applies equally to sexual offense with a child pursuant to N.C. Gen. Stat. § 14-27.4A and sexual activity by a substitute parent pursuant to N.C. Gen. Stat. § 14-27.7(a), both of which criminalize a "sexual act," and not the method by which the sexual act is perpetrated.

More recently, our Supreme Court applied the same reasoning in *Lawrence*, while addressing the issue of jury unanimity on three counts of indecent liberties with a minor. *Lawrence*, 360 N.C. at 373, 627 S.E.2d at 612. In *Lawrence*, the Court recognized that "the indecent liberties statute simply forbids 'any immoral, improper, or indecent liberties.' " *Id.* at 374, 627 S.E.2d at 612 (quoting N.C. Gen. Stat. § 14-202.1(a)(1) (2005)). "Thus, even if some jurors found that the defendant engaged in one kind of sexual misconduct, while others found that he engaged in another, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties." *Id.* (citations and internal quotation marks omitted). Consequently, the Court held "a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents." *Id.* at 375, 627 S.E.2d at 613.

Subsequent to *Lawrence*, this Court has applied the same rationale to overrule arguments regarding jury unanimity on sexual offense charges where " 'the jury was instructed on all issues, including unanimity; [and] separate verdict sheets were submitted to the jury for each charge.' " *State v. Brigman*, 178 N.C. App. 78, 93-94, 632 S.E.2d 498, 508 (quoting *Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613), *appeal dismissed and disc. review denied*, 360 N.C. 650, 636 S.E.2d 813 (2006); *see State v. Wallace*, 179 N.C. App. 710, 719-20, 635 S.E.2d 455, 462-63 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 436, 649 S.E.2d 896 (2007); *State v. Burgess*, 181 N.C. App. 27, 37-38, 639 S.E.2d 68, 75-76 (2007), *cert. denied*, 365 N.C. 337, 717 S.E.2d 384-85 (2011). This Court has also explained that

> [t]he reasoning our Supreme Court set forth in *Lawrence* may be imputed to sexual offense charges because: (1) N.C. Gen. Stat. § 15-144.2(a) authorizes, for sexual offense,

> an abbreviated form of indictment which omits allegations of the particular elements that distinguish first-degree and second-degree sexual offense[;] and (2) if a defendant wishes additional information in the nature of the specific "sexual act" with which he stands charged, he may move for a bill of particulars.

Wallace, 179 N.C. App. at 720, 635 S.E.2d at 462-63 (2006) (citations omitted).

Based on *Lawrence* and its progeny, we overrule Defendant's arguments regarding jury unanimity in this case, even though the jury may have considered a greater number of incidents than those charged in the indictments. Here, Defendant was charged with three counts of sexual offense with a child and three counts of sexual activity by a substitute parent in three separate indictments alleging one count of each offense. The jury instructions and the verdict sheets distinguished between the three sets of charges based upon the different locations where the offenses allegedly occurred and the State presented evidence of sexual offenses in each of the locations identified. Jury unanimity was shown as there was evidence of fellatio inside the house both at the computer table and in the bathroom, or that there was evidence of fellatio outside the house but on the property both inside a car and in the driveway.

Moreover, this Court has identified the following factors to consider when determining whether a defendant has been unanimously convicted by a jury:

> (1) whether defendant raised an objection at trial regarding unanimity; (2) whether the jury was instructed on all issues, including unanimity; (3) whether separate verdict sheets were submitted to the jury for each charge; (4) the length of time the jury deliberated and reached a decision on all counts submitted to it; (5) whether the record reflected any confusion or questions as to jurors' duty in the trial; and (6) whether, if polled, each juror individually affirmed that he or she had found defendant guilty in each individual case file number.

State v. Pettis, 186 N.C. App. 116, 123, 651 S.E.2d 231, 235 (2007). In the present case, although Defendant initially objected to the language proposed to differentiate the charges at the charge conference, Defendant did not object to the instructions issued to the jury or to the verdict sheets provided to the jury. The trial court instructed the jury on its duty of unanimity and the jury returned its guilty verdicts after approximately

twenty minutes of deliberation. There is no indication in the record that the jury was confused, and the jurors confirmed their guilty verdicts upon being polled in open court.

Under the circumstances in this case, there is no issue concerning unanimity of the jury verdicts. Thus, the trial court did not err in entering judgments for sexual offense with a child and sexual activity by a substitute parent in the case numbers 14 CRS 1235 and 14 CRS 50591. Similarly, the trial court did not err in entering the third judgment in 14 CRS 51139, which Defendant does not challenge on appeal.

V. Registration Requirement

[2] Defendant also challenges the trial court's order that he register as a sex offender for life upon his release from prison. Upon review, we reverse the trial court's order concerning sex offender registration and remand to the trial court.

Our General Assembly has established registration programs to assist law enforcement in the protection of the public from persons who are convicted of sex offenses or of certain other offenses committed against minors. N.C. Gen. Stat. § 14-208.5 (2015); *see also* N.C. Gen. Stat. § 14-208.6A (2015). To that end, a person who has a "reportable conviction" is required to register for a period of at least 30 years. N.C. Gen. Stat. § 14-208.7 (2015). A person who is a recidivist, who is convicted of an aggravated offense, or who is classified as a sexually violent predator is required to maintain registration for life. N.C. Gen. Stat. § 14-208.23 (2015).

In this case, the orders for lifetime registration were based on the court's findings that Defendant has been convicted of reportable convictions and that the offenses of conviction are aggravated offenses. Defendant did not contest either of these findings below. While Defendant acknowledges on appeal that he was convicted of reportable convictions and is therefore required to register as a sex offender, Defendant now contends the court erred in ordering registration for life based upon findings he was convicted of aggravated offenses. Defendant argues on appeal that neither sexual offense with a child nor sexual activity by a substitute parent are listed as aggravated offenses in the statute. We agree.

A. Standard of Review

Despite Defendant's failure to object below, this issue is preserved for appeal. As stated above, N.C. Gen. Stat. § 14-208.23 provides that "[a] person who is a recidivist, who is convicted of an aggravated offense, or who is classified as a sexually violent predator *shall*

maintain registration for the person's life." (emphasis supplied). "[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Defendant alleges a violation of a statutory mandate, and "[a]lleged statutory errors are questions of law and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (internal citations omitted).

B. Analysis

For purposes of sex offender registration and SBM requirements,

> "[a]ggravated offense" means any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a) (2015).

Defendant asserts "the trial court 'is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction' when determining whether a defendant's 'conviction offense [i]s an aggravated offense. . . .' " *State v. Treadway*, 208 N.C. App. 286, 302, 702 S.E.2d 335, 348 (2010) (quoting *State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009). "In other words, the elements of the conviction offense must 'fit within' the statutory definition of 'aggravated offense.' " *State v. Boyett*, 224 N.C. App. 102, 116, 735 S.E.2d 371, 380 (2012) (citing *State v. Singleton*, 201 N.C. App. 620, 630, 689 S.E.2d 562, 569, *disc. review improvidently allowed*, 364 N.C. 418, 700 S.E.2d 226 (2010)). Thus, our review is limited to comparing the statutory definition of "aggravated offense" to the elements of the convicted offenses.

First, Defendant was charged and convicted on three counts of sexual offense with a child under N.C. Gen. Stat. § 14-27.4A(a). At the time of the offenses, that statute provided that "[a] person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.4A (2013). Thus, the elements of sexual offense with a child are (1) a sexual act, (2) with a victim under the age of 13 years, (3) by a person who is at least 18 years old.

Second, Defendant was charged and convicted on three counts of sexual activity by a substitute parent under N.C. Gen. Stat. § 14-27.7(a). At the time of the offenses, that statute provided that "[i]f a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home . . . the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section." N.C. Gen. Stat. § 14-27.7(a) (2013). Thus, the elements of sexual activity by a substitute parent are (1) vaginal intercourse or a sexual act, (2) with a minor victim residing in a home, (3) by a person who has assumed the position of a parent in the minor victim's home.

When comparing the elements of the convicted offenses to the elements in the definition of an aggravated offense, the elements do not precisely align.

We begin our analysis with part two of the definition of aggravated offense, which the State does not address. Under part two, an offense can only be found to be an aggravated offense if it includes "engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old." N.C. Gen. Stat. § 14-208.6(1a)(ii). Whereas this second category of aggravating offense requires a victim to be under the age of 12, sexual offense with a child requires proof that the victim is under the age of 13 and sexual activity by a substitute parent requires proof that the victim is a minor—that is under the age of 18. Because the age elements differ and neither convicted offense requires proof that a victim is under the age of 12, Defendant's convicted offenses are not aggravated offenses under the second part of the aggravated offense definition. *See Treadway*, 208 N.C. App. at 303, 702 S.E.2d at 348 (holding "first degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(1) is not an aggravated offense[]" because, "[c]learly, a child under the age of 13 is not necessarily also a child less than 12 years old.").

Although the State does not address the second part of the definition, the State contends both sexual offense with a child and sexual activity by a substitute parent are aggravated offenses under part one of N.C. Gen. Stat. § 14-208.6(1a). Like part two of the definition, part one requires a sexual act involving penetration. However, instead of an age element, part one of the aggravated offense definition requires that the "sexual act involving vaginal, anal, or oral penetration" be perpetrated "through the use of force or the threat of serious violence[.]" N.C. Gen. Stat. § 14-208.6(1a)(i).

On appeal, the State asserts that the sexual act in this case involved oral penetration through the use of force. The State contends the elements of both sexual offense with a child and sexual activity by a substitute parent fall within the elements required for an aggravated offenses under N.C. Gen. Stat. § 14-208.6(1a)(i). In support of its argument, the State cites *State v. Sprouse*, 217 N.C. App. 230, 719 S.E.2d 234 (2011), *disc. review denied*, 365 N.C. 552, 722 S.E.2d 787 (2012), for the proposition that a sexual offense against a minor necessarily involves the use of force or the threat of serious violence, because a minor is incapable of consent as a matter of law. Besides asserting that the specific facts in this case show oral penetration, facts which the State acknowledges are not considered in the determination of whether a convicted offense is an aggravated offense, the State does not address whether the convicted offenses require proof of penetration.

In *Sprouse*, the defendant was convicted on multiple counts of statutory rape, statutory sex offense, indecent liberties with a child, and sexual activity by a substitute parent, and ordered to enroll in lifetime SBM for all offenses. *Id.* at 235, 719 S.E.2d at 239. Among the issues on appeal, the defendant argued the lifetime SBM orders were in error because the convictions were not for aggravated offenses. *Id.* at 239, 719 S.E.2d 241. This Court noted "no meaningful distinction between [first-degree rape of a child and statutory rape] for purposes of lifetime SBM" and, therefore, affirmed the orders of lifetime SBM based on the defendant's statutory rape convictions. *Id.* at 240-41, 719 S.E.2d at 242. This Court, however, reversed the orders of lifetime SBM based upon the convictions for statutory sex offense, sexual activity by a substitute parent, and indecent liberties with a child because "they do not meet the definition of an aggravated offense." *Id.* at 241, 719 S.E.2d at 242.

In *Sprouse*, this Court relied upon *State v. Clark*, which held that statutory rape was an aggravated offense because it involves penetration and the use of force or the threat of serious violence. *State v. Clark*, 211 N.C. App. 60, 76, 714 S.E.2d 754, 764 (2011), *disc. review denied*, __ N.C. __, 722 S.E.2d 595 (2012). This Court noted first-degree rape of a child is an aggravated offense because it requires proof of vaginal intercourse and because rape of a child under the age of 13 necessarily involves the use of force or the threat of serious violence because the child in inherently incapable of consenting. *Id.* at 72-73, 714 S.E.2d at 763.

The present case is distinguishable in that the offenses of which Defendant was convicted offenses were not rape offenses. The convicted offenses in this case were sexual offense with a child and sexual activity

by substitute parent, both of which only require a "sexual act." For purposes of both offenses, a " '[s]exual act' means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body . . . ." N.C. Gen. Stat. § 14-27.1 (2013). Not all "sexual acts" involve the element of penetration required to constitute an aggravated offense. In *Clark*, this Court differentiated first degree rape from other offenses on the basis that

> obtaining a first degree rape conviction pursuant to N.C. Gen. Stat. § 14-27.2(a)(1) requires proof that a defendant "engage[d] in vaginal intercourse" with his or her victim, as compared to some other form of inappropriate contact. N.C. Gen. Stat. § 14-27.2(a)(1). In other words, anyone found guilty of first degree rape in violation of N.C. Gen. Stat. § 14-27.2(a)(1) has necessarily "[engaged] in a sexual act involving vaginal, anal, or oral penetration," N.C. Gen. Stat. § 14-208.6(1a), based solely on an analysis of the elements of the conviction offense.

Clark, 211 N.C. App. at 73, 714 S.E.2d at 763. The same was true in *Sprouse* for statutory rape. Yet, this Court specifically noted in *Clark* that

> [t]he same is not necessarily true with respect to a conviction for first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1), since an individual can be convicted of first degree sexual offense on the basis of cunnilingus, which does not require proof of penetration. *State v. Ludlum*, 303 N.C. 666, 669, 281 S.E.2d 159, 161 (1981) (stating that "[w]e do not agree, however, that penetration is required before cunnilingus, as that word is used in the statute, can occur").

Id. at 73 n. 4, 714 S.E.2d at 763 n. 4; *see also State v. Hoover*, 89 N.C. App. 199, 208, 365 S.E.2d 920, 926 ("Proof of a "sexual act" under G.S. 14-27.7 does not require, but may involve, penetration."), *cert. denied*, 323 N.C. 177, 373 S.E.2d 118 (1988).

Because the elements of the convicted offenses in this case require only a sexual act, which may or may not involve penetration, neither sexual offense with a child pursuant to N.C. Gen. Stat. § 14-27.4A nor sexual offense by a substitute parent pursuant to N.C. Gen. Stat. § 14-27.7(a) necessarily involves the penetration statutorily required to

constitute an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a). We reverse the registration order and remand to the trial court for entry of a registration order based upon proper findings.

IV. SBM Requirement

[3] The trial court also ordered Defendant to enroll in SBM for the remainder of his life upon his release from prison. In the final issue on appeal, Defendant contends the trial court erred in ordering lifetime SBM without a determination that the program was a reasonable search as mandated under *Grady v. North Carolina*, __ U.S. __, 191 L. Ed. 2d 459 (2015). The State concedes the issue and we agree.

The findings that Defendant's convictions require lifetime registration for aggravated offenses were in error. Therefore, the order for lifetime SBM must be supported on other grounds. Defendant acknowledges the court correctly found that he had been convicted of sex offense with a child and that lifetime SBM is mandated by N.C. Gen. Stat. § 14-27.4A for a conviction of sex offense with a child. That statute provides that

> (b) A person convicted of [sexual offense with a child] is guilty of a Class B1 felony and shall be sentenced pursuant to Article 81B of Chapter 15A of the General Statutes, except that in no case shall the person receive an active punishment of less than 300 months, and except as provided in subsection (c) of this section. *Following the termination of active punishment, the person shall be enrolled in satellite-based monitoring for life pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes.*

N.C. Gen. Stat. § 14-27.4A(b) (emphasis added).

However, in *Grady*, the Supreme Court of the United States held that North Carolina's SBM program constitutes a search within the meaning of the Fourth Amendment and must be reasonable based on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. *Grady*, __ U.S. at __, 191 L. Ed. 2d at 462. The Supreme Court then remanded the matter for a hearing on the reasonableness of SBM in the case. *Id.*

Under the mandate of *Grady*, in *State v. Blue*, __ N.C. App. __, __, 783 S.E.2d 524, 527 (2016), this Court reversed a SBM order after "the trial court simply acknowledged that SBM constitutes a search and

summarily concluded it is reasonable[.]" This Court held the trial court failed to follow the mandate in *Grady* to determine the reasonableness of the SBM program based upon the totality of the circumstances and remanded the matter to the trial court for a new hearing. *Id.* This Court also held the State bears the burden of proving SBM and the length thereof is reasonable. *Id.*

In the present case, Defendant and the State agree that no evidence was presented to demonstrate the reasonableness of lifetime SBM. As a result, we reverse the SBM order and remand for the reasonableness determination mandated by *Grady*. *See Grady*, __ U.S. at __, 191 L. Ed. 2d at 462.

VII. Conclusion

We hold the jury unanimously convicted Defendant on three counts each of sexual offense with a child and sexual activity by a substitute parent. Defendant received a fair trial free from error in the convictions or entry of those judgments.

We reverse the orders for lifetime registration and lifetime SBM and remand to the trial court for further proceedings and orders consistent with the law. *See id. It is so ordered.*

NO ERROR IN PART; REVERSED IN PART AND REMANDED.

Judges McCULLOUGH and DILLON concur.

Judge McCULLOUGH concurred in this opinion prior to 24 April 2017.

STATE v. REGAN

[253 N.C. App. 351 (2017)]

STATE OF NORTH CAROLINA
v.
WANDA LEE REGAN, DEFENDANT

No. COA16-682

Filed 2 May 2017

1. Appeal and Error—notice of appeal—inaccurate judgment date—certiorari

The Court of Appeals granted defendant's petition for certiorari where defendant's notice of appeal contained an inaccurate judgment date, in violation of Rule 4 of the N.C. Rules of Appellate Procedure.

2. Probation and Parole—revocation—subject matter jurisdiction—probation from another county

The Harnett County Superior Court had subject matter jurisdiction to revoke defendant's probation in a Sampson County case even though the record did not show a transfer of the case to Harnett County. Defendant was already on probation from a prior Harnett County case, her probation was supervised in Harnett County, she lived in Harnett County, and defendant violated her probation in Harnett County.

3. Probation and Parole—revocation—findings

The trial court did not make insufficient findings when revoking defendant's probation. The transcript and judgments reflected that the judge considered the evidence and the judge complied with the relevant statute, N.C.G.S. § 15A-1344(f), by finding good cause to revoke probation. The statute did not require that the trial court make any specific findings.

Appeal by Defendant from judgment entered 27 January 2016 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 11 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison A. Angell, for the State.

Joseph P. Lattimore for Defendant-Appellant.

INMAN, Judge.

A trial court located in a county where a defendant resides and violates the terms of her probation is vested with jurisdiction to revoke the defendant's probation.

Wanda Lee Regan ("Defendant") appeals judgments revoking her probation in two criminal matters. On appeal, Defendant argues that the trial court in Harnett County lacked subject matter jurisdiction to commence a probation revocation hearing because the probation originated in Sampson County. Defendant also argues that the trial court erred in failing to make statutorily required findings of good cause to revoke her probation. After careful review, we affirm.

Factual & Procedural History

The evidence presented before the trial court tends to show the following:

On 16 March 2010 in Harnett County District Court, Defendant pled guilty in case number 09 CRS 054650, the case originating in Harnett County, to forging an instrument on 2 June 2009. The trial court accepted Defendant's plea and sentenced her to a minimum four months and a maximum six months imprisonment. The trial court suspended the sentence and placed Defendant on supervised probation for 24 months. Defendant's probation was supervised in the Harnett County Probation Office. In the Spring of 2011, Defendant's probation was supervised by Harnett County Probation Officer Sabrina Wiley.

On 3 May 2010 in Sampson County Superior Court, Defendant pled guilty in case number 09 CRS 052339, the case originating in Sampson County, to attempted first degree burglary on 25 July 2009. The trial court accepted Defendant's plea and sentenced her to a minimum 23 months and a maximum 37 months imprisonment. The trial court suspended the sentence and placed Defendant on supervised probation for 24 months. Defendant's probation was supervised in the Harnett County Probation Office, but the record on appeal does not reflect that Defendant's probation case was transferred from Sampson to Harnett County.

On 30 March 2011, Defendant spoke with Officer Wiley by phone and advised her that she had left North Carolina. Defendant refused to disclose her location.

On 5 April 2011, Defendant failed to attend a scheduled meeting with Officer Wiley. Subsequently, on 14 April 2011, a warrant was issued in Harnett County for Defendant's arrest. On that same date, Harnett County Probation Officer Norma Wood—who was working

as a surveillance officer tasked with locating people who had fled the jurisdiction—was assigned to locate and arrest Defendant.

Officer Wood traveled to Defendant's last known address, a mobile home park in Angier, in Harnett County, where Defendant had lived with her aunt. Wood also visited Defendant's mother's home in Harnett County and called Defendant's daughter, who resided in Garner, North Carolina. Defendant's family members told Officer Wood that Defendant had left North Carolina, but did not disclose where Defendant was located.

On 25 April 2011, Officer Wiley filed a Probation Report in Harnett County Superior Court in case number 09 CRS 054650, the case originating in Harnett County. The Probation Report alleged that Defendant failed to report for a scheduled appointment on 5 April 2011, was in arrears with regard to monetary obligations, and left the jurisdiction without permission.

On that same date, Wiley filed a second Probation Report in Harnett County Superior Court in case number 11 CRS 00906. This case number corresponded with 09 CRS 052339, the case originating in Sampson County. The second Probation Report also alleged that Defendant failed to report for a scheduled appointment on 5 April 2011, was in arrears with regard to monetary obligations, and left the jurisdiction without permission.

Defendant avoided probation supervision for more than four years after notifying Officer Wiley that she had left North Carolina. She surrendered to law enforcement authorities in Texas in late 2015 and was extradited to North Carolina. More than a month prior to her arrest in Texas, Defendant contacted Officer Wood by telephone and said she wanted to surrender, but Defendant would not disclose her location.

The probation violation cases came on for hearing 27 January 2016 in Harnett County Superior Court, Judge C. Winston Gilchrist presiding. The State offered the testimony of one witness, Officer Wood, who by that time had been assigned to supervise Defendant's probation after Officer Wiley had been reassigned to another county. Defendant also testified at the hearing.

Defendant admitted that she left North Carolina in 2011 and went to Texas. She also admitted to speaking with Officer Wood by telephone. At the conclusion of the probation violation hearing, the trial court found Defendant in willful violation of the terms and conditions of her probation, revoked her probation in both cases, and activated her suspended sentences.

Defendant filed a timely notice of appeal. Defendant also filed a petition for writ of certiorari in the alternative, should this Court find her written notice of appeal defective.

Appellate Jurisdiction

[1] As an initial matter, we must address this Court's jurisdiction. On 10 February 2016, Defendant filed a notice of appeal to this Court. The notice of appeal referred to an inaccurate judgment date, in violation of Rule 4 of the North Carolina Rules of Appellate Procedure. *See* N.C.R. App. P. 4(a) (2014) ("The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record."). Defendant filed a petition for writ of certiorari seeking this Court's review notwithstanding her defective notice of appeal. "While this Court cannot hear [D]efendant's direct appeal, it does have the discretion to consider the matter by granting a petition for writ of *certiorari*." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005). As such, we allow Defendant's petition for writ of certiorari and address her appeal on the merits.

Analysis

I. *Trial Court Jurisdiction*

[2] Defendant contends that the State failed to present sufficient evidence that the Harnett County Superior Court had subject matter jurisdiction to revoke probation in file number 11 CRS 00906, the case which originated in Sampson County. We disagree.

A party may raise the issue of subject matter jurisdiction at any time. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

Section 15A-1344(a) of the North Carolina General Statutes—entitled "Authority to Alter or Revoke"—provides in pertinent part:

> Except as provided in subsection (a1) or (b), probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133

> or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the sentence of probation was imposed, *where the probationer violates probation, or where the probationer resides*.

N.C. Gen. Stat. § 15A-1344 (2015) (emphasis added).

Defendant argues that the State did not meet its burden of showing that 1) the Sampson County probation was transferred to Harnett County Superior Court and the Harnett County Superior Court thereafter issued its own probation order authorizing supervision of Defendant; 2) Defendant violated her probation in Harnett County; or 3) Defendant resided in Harnett County at the time of the violations. Defendant's argument is refuted by evidence that at the time she violated her probation by failing to pay supervision fees and by leaving the state, her residence was in Harnett County. Defendant's argument also is refuted by evidence that she violated her probation by failing to report for an appointment with her probation officer in Harnett County, thus vesting Harnett County Superior Court with jurisdiction to revoke Defendant's probation.

"It is presumed, when the Court is not required to find facts and make conclusions of law and does not do so, that the court on proper evidence found facts to support its judgment." *Sherwood v. Sherwood*, 29 N.C. App. 112, 113-14, 223 S.E.2d 509, 510-11 (1976) (citations omitted). Here, it was reasonable for the trial court to find that Defendant resided in Harnett County. Defendant's last address known to the Harnett County Probation Office, which was supervising her probation, was in Harnett County. Defendant testified that Officer Wood had visited the mobile home in Angier where Defendant lived with her aunt to make sure that Defendant was at home during the curfew hours required by the terms of her probation. Defendant also testified that "I always have a home with my mother, yes." Defendant's mother lived in Harnett County at the time Defendant violated her probation.

Moreover, the trial court also could have found as a fact, based on a reasonable inference from the evidence, that Defendant violated the terms of her probation in Harnett County when she failed to meet with Officer Wiley on 5 April 2011. Probation officers routinely schedule appointments with probationers at county probation offices, so that officers can meet with multiple probationers in a single day and complete office work while waiting for probationers to report for their appointments. By failing to appear for her appointment with Officer Wiley of the Harnett County Probation Office, Defendant committed a probation violation in Harnett County.

In order to avoid disputes, uncertainty, and costly litigation, the better practice for probation officers is to specify on probation violation reports any address relevant to alleged probation violations, such as the last known address of a probationer who has left the jurisdiction without permission or the address of the probation office where a defendant failed to attend a scheduled meeting. Additionally, in a probation violation hearing, the better practice for the State is to introduce direct evidence of any address relevant to an alleged probation violation. In this case, the indirect evidence—sufficient to allow the reasonable inference that Defendant resided in Harnett County when she fled the jurisdiction and violated her probation in Harnett County by failing to meet with her probation officer there—supports the trial court's presumed findings necessary to support its judgment.

Defendant also argues that the trial court had no jurisdiction to revoke her probation in the case originating in Sampson County because there is no record showing that her probation case was transferred from Sampson County to Harnett County. However, Defendant cites no controlling statute or precedent, nor are we aware of any requiring transfer of a probation case to the county where probation is ultimately revoked so long as the probationer resided in that county or violated probation in that county.

Because the evidence supported the trial court's presumed findings that Defendant resided in Harnett County and violated the terms of her probation in Harnett County, we hold that the Harnett County Superior Court had subject matter jurisdiction to revoke Defendant's probation in 11 CRS 00906, the case originating in Sampson County.

II. *Requisite Findings*

[3] Defendant contends that the trial court erred in revoking her probation after its expiration because it did not make adequate findings of fact. This argument is without merit.

Section 15A-1344(f) of the North Carolina General Statutes—entitled "Extension, Modification, or Revocation after Period of Probation"—provides the four criteria that must be met for the trial court to extend, modify, or revoke probation after the probation term has expired:

> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.
>
> (4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

N.C. Gen. Stat. § 15A-1344(f). Defendant contends the trial court erred in failing to make any written or oral findings of good cause to revoke her probation. This argument is misplaced.

Defendant relies on *State v. Love*, 156 N.C. App. 309, 576 S.E.2d 709 (2003) for the contention that the trial court's failure to make the requisite findings of fact was error that renders the judgments void. However, *Love* involved a different statute, N.C. Gen. Stat. § 15A-1343.2(d) (2003), which requires the trial court to make "*specific findings* that longer or shorter periods of probation are necessary" to deviate from probation terms provided by that statute. N.C. Gen. Stat. § 15A-1343.2(d) (emphasis added). The statute at issue in this case does not require that the trial court make any specific findings. It simply provides that the trial court can alter probation after expiration of the period of probation has expired if "the [trial] court finds for good cause shown and stated that the probation should be extended, modified, or revoked." N.C. Gen. Stat. § 15A-1344(f)(3).

A criminal defendant is subject to revocation of her probation for any violation committed prior to 1 December 2011:

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citations and quotation marks omitted).

The trial court complied with N.C. Gen. Stat. § 15A-1344(f)(3) by finding good cause to revoke Defendant's probation. Remaining in North Carolina was a condition of Defendant's probation. Defendant testified that she left the jurisdiction in 2011. Reporting for office meetings with her probation officer as directed was also a condition of Defendant's probation. The State presented competent evidence, the sworn affidavit of Officer Wiley, that Defendant failed to report as directed on 5 April 2011. Defendant testified that she did not return to North Carolina because "after talking to Ms. Woods, I mean, frankly, it scared the hell out of me, so I didn't come back." From the bench, the trial court announced, "I find the Defendant's in willful violation of the terms and conditions of her probation."

Each of the judgments—09 CR 54650, the case originating in Harnett County, and 11 CRS 00906, the case originating in Sampson County—incorporates a corresponding violation report (both dated 25 April 2011) and indicates the specific paragraphs of the violation report which the trial court found as the basis for the finding that Defendant willfully violated the terms of her probation. Each judgment also includes a box checked by the trial court indicating that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence." Both the transcript of the probation violation hearing and the judgments entered reflect that the trial court considered the evidence and found good cause to revoke Defendant's probation.

Conclusion

Because the trial court had jurisdiction and found good cause to revoke Defendant's probation, we affirm the orders revoking Defendant's probation.

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

Judge Douglas McCullough concurred in this opinion prior to 24 April 2017.

STATE v. REYNOLDS

[253 N.C. App. 359 (2017)]

STATE OF NORTH CAROLINA
v.
JOE ROBERT REYNOLDS, DEFENDANT

No. COA16-149

Filed 2 May 2017

1. Constitutional Law—federal—double jeopardy—sex offender—failure to notify sheriff of change of address—failure to report in person to sheriff's office

Double jeopardy was violated where defendant, a sex offender, was convicted of failing to inform the sheriff of a change of address under N.C.G.S. § 14-208.11(a)(2) and (a)(7), pursuant to the requirements in N.C.G.S. § 14-208.9(a). The latter statute applied to both subsections of N.C.G.S. § 14-208.11, so that both had the same elements.

2. Sexual Offenders—change of address—failure to report

The trial court correctly denied the motion of sexual offender to dismiss charges involving the failure to register his change of address after he was released from jail. Defendant had registered prior to being jailed for 30 days for contempt. The N.C. Supreme Court has not established a minimum time for the facility imprisoning a registrant to be considered a new address. The defendant in this case was not merely in jail overnight.

3. Appeal and Error—mootness—case overruled between trial and appeal

Defendant's argument that a trial court erred by not allowing him to refer to a Court of Appeals case in his closing argument was moot where the N.C. Supreme Court overruled the Court of Appeals case between trial and appeal.

4. Indictment and Information—tracking language of relevant statute

Indictments for two offenses, which involved the failure of a sex offender to register, each alleged the essential elements of the offense charged where they tracked the language of the relevant statute.

Appeal by defendant from judgment entered on or about 5 November 2015 by Judge William D. Albright in Superior Court, Surry County. Heard in the Court of Appeals 8 August 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General William P. Hart, Jr., for the State.

Amanda S. Zimmer, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment from two convictions arising out of his failure to inform the sheriff's office of his address after being released on parole and one conviction for attaining the status of habitual felon. For the following reasons, we vacate one of defendant's convictions on the basis of double jeopardy, find no error on the other issues raised, and remand for resentencing.

I. Background

The general background of this case was stated in *State v. Reynolds*,

> On or about 22 July 2013, defendant was indicted for failing to register as a sex offender. Thereafter, on or about 7 October 2013, defendant was indicted for attaining the status of habitual felon. During defendant's trial, two witnesses testified on behalf of the State. The first witness was defendant's supervising parole officer who testified that though defendant had on more than one occasion previously registered as a sex offender within three business days as required by law, defendant eventually refused to register after he was released from incarceration after a parole violation, stating that he was already registered and nothing had changed. The second witness was a detective with the Surry County Sheriff's Office who testified that he went to a magistrate for an arrest warrant due to defendant's failure to register within three business days of being released from incarceration, although he too noted defendant had previously registered.

___ N.C. App. ___, 775 S.E.2d 695, slip op. at 1-2. (No. COA14-1019) (June 16, 2015) (unpublished) ("*Reynolds I*"). In *Reynolds I*, this Court vacated defendant's convictions concluding North Carolina General Statute § 14-208.11(a)(1) "logically applies only to individuals who are registering for the first time and not to defendant, who was already registered." *See id.* at 4.

Thereafter, in August of 2015, defendant was again indicted for failure to report a new address as a sex offender and failure to report in

person as a sex offender, both on the same offense date as in *Reynolds I*, but under North Carolina General Statute § 14-208.11(a)(2) and (a)(7). Defendant was also indicted for attaining the status of habitual felon. After a trial, the jury found defendant guilty on all counts, and the trial court entered judgment. Defendant appeals.

II. Double Jeopardy

[1] Defendant was convicted of two separate crimes arising from his failure to register his change of address, one pursuant to North Carolina General Statute § 14-208.11(a)(2) and one pursuant to North Carolina General Statute § 14-208.11(a)(7). North Carolina General Statute § 14-208.11(a) provides in pertinent part:

> (a) A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:
>
> . . . .
>
> (2) Fails to notify the last registering sheriff of a change of address as required by this Article.
>
> . . . .
>
> (7) Fails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A.

N.C. Gen. Stat. § 14-208.11(a) (2013).

North Carolina General Statute § 14-208.11(a)(7) refers to three other statutes which address registration in different situations, but only one, § 14-208.9, is applicable in this situation.[1] Thus here, the State was required to prove that defendant failed to register as required by North Carolina General Statute § 14-208.9.

North Carolina General Statute § 14-208.9(a) provides in pertinent part:

> (a) If a person required to register changes address, the person shall *report in person* and *provide written*

1. North Carolina General Statute § 14-208.7 is not applicable here because it applies to "the initial registration[.]" *State v. Crockett*, 368 N.C. 717, 722, 782 S.E.2d 878, 882 (2016) ("We now hold that N.C.G.S. § 14–208.9, the change of address statute, and not section 14–208.7, the registration statute, governs the situation when, as here, a sex offender who has already complied with the initial registration requirements is later incarcerated and then released."). North Carolina General Statute § 14-208.9A is not applicable here either since that statute specifically deals with verification of registration. *See* N.C. Gen. Stat. § 14-208.9A (2013).

> notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. If the person moves to another county, the person shall also report in person to the sheriff of the new county and provide written notice of the person's address not later than the tenth day after the change of address.

N.C. Gen. Stat. § 14-208.9(a) (2013) (emphasis added).

With this background in mind, we turn to defendant's double jeopardy argument. Defendant contends that the trial court violated his constitutional protection against double jeopardy by entering judgment for convictions under both North Carolina General Statute § 14-208.11(a)(2) and (a)(7). "The standard of review for this issue is *de novo*, as the trial court made a legal conclusion regarding the defendant's exposure to double jeopardy." *State v. Fox*, 216 N.C. App. 144, 147, 721 S.E.2d 673, 675 (2011) (citation and quotation marks omitted). "[T]he applicable test to determine whether double jeopardy attaches in a single prosecution is whether each statute requires proof of a fact which the others do not." *State v. Mulder*, 233 N.C. App. 82, 89, 755 S.E.2d 98, 102 (2014) (citation, quotation marks, and brackets omitted).

Turning back to the statute under which defendant was convicted:

> (a) A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:
>
> . . . .
>
> (2) Fails to notify the last registering sheriff of a change of address as required by this Article.
>
> . . . .
>
> (7) Fails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A.

N.C. Gen. Stat. § 14-208.11(a). Our Court has already plainly stated that "[a] conviction for violating N.C. Gen. Stat. §§ 14–208.9(a) and *14–208.11(a)(2)* requires proof beyond a reasonable doubt that: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address [.]" *See State v. Worley*, 198 N.C. App. 329, 334, 679 S.E.2d 857, 861 (2009) (emphasis added) (citations, quotation marks, ellipses, and brackets omitted). As to the elements of North Carolina General Statute § 14-208.11(a)(7), we have already established that in

this particular case North Carolina General Statute § 14-208.11(a)(7) is controlled by the elements in North Carolina General Statute § 14-208.9 because the other two statutes noted in (a)(7) regarding initial registration and verification of registration are not applicable here. *See* N.C. Gen. Stat. § 14-208.11(a)(7); *see also* N.C. Gen. Stat. § 14-208.9A; *Crockett*, 368 N.C. at 722, 782 S.E.2d at 882. *Worley* clearly states that "N.C. Gen. Stat. §§ 14–208.9(a) and 14–208.11(a)(2)" have the exact same elements. *See Worley*, 198 N.C. App. at 334, 679 S.E.2d at 861. Thus, in this particular instance *both* § 14-208.11(a)(2) and (a)(7) required defendant to inform the sheriff of his change of address pursuant to the requirements in § 14-208.9(a). *See* N.C. Gen. Stat. § 14-208.11(a)(2) and (7); *Worley*, 198 N.C. App. at 334, 679 S.E.2d at 861.

The State attempts to distinguish the elements of North Carolina General Statute § 14-208.11(a)(2) and (7) by arguing

> the trial court's charge of failing to notify the last registering sheriff of a change of address was based upon Defendant's failure to provide written notice to the sheriff only . . .; on the other hand, the charge of failing to report in person as required by N.C. Gen. Stat. § 14-208.9[2] was based upon Defendant's failure to report in person for the purpose of providing the written notification.

But the State's attempted distinction between (a)(2) and (a)(7) is eliminated by North Carolina General Statute § 14-208.9, which applies equally to both subsections. *See* N.C. Gen. Stat. § 14-208.11(a)(2) and (7); *Worley*, 198 N.C. App. at 334, 679 S.E.2d at 861. North Carolina General Statute § 14-208.9 requires a registrant to "report *in person* and provide *written notice* of the new address[,]" N.C. Gen. Stat. § 14-208.9 (emphasis added), and this language is applicable to both § 14-208.11(a)(2) and (a)(7). *See State v. Holmes*, 149 N.C. App. 572, 576, 562 S.E.2d 26, 30 (2002) ("N.C.G.S. § 14–208.9 and the statute in question, § 14–208.11, are both within Article 27A, which defines the sex offender and public protection registration programs. Because they deal with the same subject matter, they must be construed in *pari materia* to give effect to each.") Because in this case North Carolina General Statute § 14-208.11(a)(2) and (a)(7) have the same elements, one of defendant's convictions must be vacated for violation of double jeopardy. *See generally State v. Dye*, 139 N.C.

---

2. To be clear, defendant was not indicted under North Carolina General Statute § 14-208.9; the State charged defendant under § 14-208.11(a)(7) but that statute incorporates the requirements of § 14-208.9 in this case.

App. 148, 153, 532 S.E.2d 574, 578 (2000) ("Under the circumstances of the instant case, therefore, the Double Jeopardy Clause constituted a bar to defendant's subsequent prosecution upon the domestic criminal trespass charge, and her conviction must be vacated[.]" (citation omitted)).

Furthermore, to the extent the State argues the legislature intended North Carolina General Statute § 14-208.11(a)(2) and (a)(7) to be punished separately, we disagree. The entirety of the State's argument focuses upon "the express duty of registered offenders to report in person" versus "the purpose of requiring written notice[,]" but again, in this case both North Carolina General Statute § 14-208.11(a)(2) and (a)(7) required defendant to "report in person *and* provide written notice of the new address" pursuant to North Carolina General Statute § 14-208.9. N.C. Gen. Stat. § 14-208.9 (emphasis added). There is simply no legal or practical difference between the two subsections as applied here. Therefore, we vacate one of defendant's convictions under North Carolina General Statute § 14-208.11 and remand for defendant to be resentenced on the remaining conviction.

III. Motion to Dismiss

[2] Defendant also contends that "the trial court erred in denying . . . [his] motion to dismiss when the State failed to present sufficient evidence that . . . [he] had changed his address." (Original in all caps.) Defendant contends that "[t]he undisputed evidence showed that . . . [he] initially registered in September 2011 with an address of . . . Shoals Road. . . . He was incarcerated at times following that registration, but always returned to the same address." Thus, the only element defendant challenges is whether his address had changed.

> When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the record evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. The State is entitled to every reasonable intendment and inference to be drawn from the evidence, and any contradictions and discrepancies are to be resolved in favor of the State. The only issue before the trial court in such instances is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as

> adequate to support a conclusion. As long as the evidence permits a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

Worley, 198 N.C. App. at 333, 679 S.E.2d at 861 (citations and quotation marks omitted).

The undisputed evidence establishes that although defendant had registered in September of 2011, he was thereafter incarcerated and released in January of 2013. In reversing a decision of this Court, our Supreme Court clarified,

> [a]s long as the registrant remains incarcerated, his address is that of the facility or institution in which he is confined. Although the State did not elicit any evidence tending to show the location at which defendant had been incarcerated prior to his release from the custody of the Division of Adult Correction on 14 November 2012, his address necessarily changed when he was released from incarceration. As a result, in accordance with N.C.G.S. § 14–208.9(a), defendant was required to report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. Although defendant had last registered with the Gaston County Sheriff's Office, he failed to report in person or provide written notice of the fact that his address had changed from the facility or institution in which he had been incarcerated to his new residence following his release from the custody of the Division of Adult Correction on 14 November 2012.

State v. Barnett, 368 N.C. 710, 714-15, 782 S.E.2d 885, 889-90 (2016) (citations, quotation marks, ellipses, brackets, and footnote omitted).

Defendant argues in response to *Barnett* that he was only in prison for a month, not long enough to establish a new address. But our Supreme Court did not establish a minimum time period of incarceration for the facility imprisoning a registrant to be considered a new address; rather, the Court stated, "[a]s long as the registrant remains incarcerated, his address is that of the facility or institution in which he is confined." *Id.* at 714, 782 S.E.2d at 889. Defendant was not merely in jail overnight but rather was incarcerated for "a 30-day contempt period[,]" so *Barnett*

still controls. *See id.* By showing defendant had been incarcerated for approximately a month and then released, the State established that defendant had a new address, *see id.*, and thus the trial court properly denied defendant's motion to dismiss. This argument is overruled.

IV. Sentencing

Defendant next contends that "[t]he trial court sentenced . . . [him] in violation of N.C. GEN. STAT. § 15A-1335 when [it] imposed a sentence of 117-153 months when . . . [he] had previously been sentenced to 87-117 months for the same conduct." As an initial matter, the State contends that because defendant challenges his presumptive range sentence, defendant has no right to appeal. But since we are vacating one of defendant's convictions he will necessarily need to be resentenced. Thus, we need not address this issue.

V. *State v. Barnett*

[3] Defendant next contends that the trial court erred by not allowing his counsel to refer to *State v. Barnett*, 239 N.C. App. 101, 768 S.E.2d 327 (2015) in his closing argument. But since defendant's trial, this Court's opinion in *State v. Barnett* was reversed by the Supreme Court in *Barnett*, 368 N.C. 710, 782 S.E.2d 885. Even if defendant should have been allowed to argue based upon *State v. Barnett*, 239 N.C. App. 101, 768 S.E.2d 327, at the time of his trial, there is no way to correct the error now. And even if this Court granted a new trial as defendant requests, defendant would not now be allowed to rely upon *State v. Barnett*, 239 N.C. App. 101, 768 S.E.2d 327, as it is not the law. Therefore, this issue is moot. *See generally Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) ("A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." (quotation marks omitted)).

VI. Indictments

[4] Defendant argues that the indictments are fatally defective because they fail to allege an essential element of North Carolina General Statute § 14-208.11(a)(2) and (a)(7). Defendant's argument contends

> [t]he indictments in this case are fatally defective because they failed to allege that Mr. Reynolds changed his address which is an essential element of the offense of failing to report or notify of an address change. Rather, the indictments only allege Mr. Reynolds failed to appear in person

> and provide written notice of his address after his release from incarceration.

(Quotation marks omitted.) "We review the issue of insufficiency of an indictment under a *de novo* standard of review." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008).

The question of what is required in an indictment for crimes under North Carolina General Statute § 14-208.11 has been answered previously by this Court and our Supreme Court; for a thorough review consider our Supreme Court's recent opinion of *State v. Williams*, 368 N.C. 620, 781 S.E.2d 268 (2016). Ultimately, the *Williams* Court

> acknowledged the general rule that an indictment using either literally or substantially the language found in the statute defining the offense is facially valid and that the quashing of indictments is not favored. Here, defendant's indictment included the critical language found in N.C.G.S. § 14–208.11, alleging that he failed to meet his obligation to report as a person required by Article 27A of Chapter 14. This indictment language was consistent with that found in the charging statute and provided defendant sufficient notice to prepare a defense. Additional detail about the reporting requirement such as that found in section 14–208.9 was neither needed nor required in the indictment.
>
> Because defendant's indictment substantially tracks the language of section 14–208.11(a)(2), the statute under which he was charged, thereby providing defendant adequate notice, we conclude that the Court of Appeals' analysis in *Williams* is consistent with the applicable statutes and holdings cited above. Accordingly, we hold that defendant's indictment is valid and conferred jurisdiction upon the trial court.

368 N.C. 620, 626, 781 S.E.2d 268, 272–73 (2016) (citations and quotation marks omitted).

Here, one indictment alleged that

> as a person required by Article 27A of Chapter 14 of the General Statutes to register as a sex offender, fail to notify the last registering Sheriff, Graham Atkinson, of an address change by failing to appear in person and

> provide written notice of his address after his release from incarceration[, and]

the other indictment alleged that

> as a person required by Article 27A of Chapter 14 of the General Statutes to register as a sex offender, fail to report in person to the Sheriff's Office as required by N.C.G.S. 14-208.9(a) by failing to appear in person and provide written notice of his address after his release from incarceration.

Each indictment "substantially tracks the language of . . . the statute under which he was charged, thereby providing defendant adequate notice[.]" *Id.* at 626, 781 S.E.2d at 273. Therefore, this argument is overruled.

VII. Jury Instructions

Lastly, defendant contends that "the trial court plainly erred when it varied from the pattern instruction and failed to instruct on all elements of the offense of failure to report an address change." (Original in all caps.) This argument is tied to defendant's double jeopardy argument as he contends that "had the jury been properly instructed, they probably would have found . . . [him] guilty of only one offense, as even the trial court recognized that pattern instruction 'lumps it all into one charge,' although in this case the State 'broke it up into two.' " Because we are vacating one of defendant's convictions, we need not address this issue.

VIII. Conclusion

In conclusion, we vacate one of defendant's two convictions under North Carolina General Statute § 14-208.11(a) on the basis that his right to be free from double jeopardy was violated. Since we are vacating one conviction, we remand for resentencing. As to all other issues, we find no error.

VACATED in part; NO ERROR in part; REMANDED FOR RESENTENCING.

Chief Judge McGEE and Judge CALABRIA concur.

STATE v. WHITEHURST

[253 N.C. App. 369 (2017)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
ROCKY DARYL WHITEHURST, JR., DEFENDANT

No. COA16-1021

Filed 2 May 2017

1. Criminal Law—guilty plea—motion to withdraw—coercion—timing

Defendant did not establish a fair and just reason to withdraw a guilty plea where the record did not support his contention that the plea was entered hastily or that he moved promptly to withdraw the plea. There was no authority for the proposition that the incarceration is per se evidence of coercion.

2. Criminal Law—guilty plea—motion to withdraw—strength of State's evidence—sufficient

Defendant failed to effectively challenge the strength of the State's evidence against him on a motion to withdraw his plea. The prosecutor's summary indicated that the case was simple and straightforward, defendant did not identify evidentiary issues, and defendant did not contend that the case presented complex legal or forensic issues.

3. Criminal Law—guilty plea—motion to withdraw—assertion of innocence—Alford pleas not sufficient

Defendant's assertion of an *Alford* plea was not a sufficient assertion of innocence for a withdrawal of his plea.

4. Criminal Law—guilty plea—withdrawal of plea—burden not shifted to State

The burden did not shift to the State to show that it was prejudiced in a hearing on a motion to withdraw a guilty plea where defendant did not meet his burden of showing a fair and just reason to withdraw his plea.

5. Sentencing—restitution—amount—evidence not sufficient

An order of restitution was reversed and remanded where there was no evidence to support the amount.

Appeal by defendant from judgment entered 5 August 2015 by Judge J. Carlton Cole in Pasquotank County Superior Court. Heard in the Court of Appeals 3 April 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Keith Clayton, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

ZACHARY, Judge.

Rocky Daryl Whitehurst, Jr. (defendant) appeals from the judgment entered upon his entry of a plea of guilty to the offense of obtaining property by false pretenses. On appeal, defendant argues that the trial court erred by denying his motion to withdraw his guilty plea. We conclude that the trial court did not err by denying his motion. Defendant also argues, and the State agrees, that the trial court erred by ordering defendant to pay $200 in restitution when no evidentiary support was offered for the amount of restitution. We conclude that the trial court erred in entering its restitution award.

I. Background

On 9 March 2015, the Grand Jury for Pasquotank County returned an indictment charging defendant with obtaining property by false pretenses and possession of stolen property. Defendant was arrested for these offenses on 24 April 2015, and was placed in custody. On 8 June 2015, defendant appeared before the trial court. Defendant asked to have counsel appointed to represent him on the instant charges, and expressed a wish to resolve the case on that day if possible. Accordingly, the trial court appointed counsel for defendant and held the case open.

Later that day, defendant again appeared before the court. Defendant's attorney informed the trial court that defendant would plead guilty to one count of obtaining property by false pretenses, pursuant to a plea arrangement. The trial court asked defendant the questions on the plea transcript form, and defendant answered under oath. Defendant entered a plea of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37-39, 27 L. Ed. 2d 162, 171-72 (1970), which held that a defendant may enter a guilty plea containing a protestation of innocence when the defendant intelligently concludes that a guilty plea is in his best interest. Defendant acknowledged that under the terms of the plea arrangement he would plead guilty to one count of obtaining property by false pretenses and receive a probationary sentence, and that the State would dismiss the charge of possession of stolen property. After the plea transcript was completed, the prosecutor summarized the factual basis for the charge against defendant. Defendant did not object to

the prosecutor's summary of the factual support for the charges. Prior to sentencing, the trial court adjourned for the day. The next day, 9 June 2015, defendant appeared in court for sentencing. His counsel asked for a continuance and the trial court continued defendant's sentencing until 5 August 2015.

On 3 August 2015, defendant filed a motion asking the trial court to allow him to withdraw his plea of guilty. The trial court conducted a sentencing proceeding on 5 August 2015, at which defendant's counsel asked the court to set aside defendant's plea. After hearing from defense counsel and the State, the trial court denied defendant's motion to withdraw his plea of guilty, sentenced defendant to a suspended term of 8 to 19 months' imprisonment, and placed defendant on 36 months of supervised probation. Defendant appealed to this Court.

II. Denial of Defendant's Motion to Withdraw Guilty Plea

A. Standard of Review

"In reviewing a trial court's denial of a defendant's motion to withdraw a guilty plea made before sentencing, 'the appellate court does not apply an abuse of discretion standard, but instead makes an independent review of the record.' " *State v. Robinson*, 177 N.C. App. 225, 229, 628 S.E.2d 252, 254 (2006) (quoting *State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993)). "There is no absolute right to withdraw a plea of guilty, however, a criminal defendant seeking to withdraw such a plea before sentencing is 'generally accorded that right if he can show any fair and just reason.' " *Marshburn*, 109 N.C. App. at 107-08, 425 S.E.2d at 717 (quoting *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990)). "The defendant has the burden of showing that his motion to withdraw is supported by some fair and just reason." *Marshburn* at at 108, 425 S.E.2d at 717 (internal quotation omitted). "There is no established rule in North Carolina governing the standard by which a judge is to decide a motion to withdraw a plea of guilty prior to sentencing." *Handy*, 326 N.C. at 538, 391 S.E.2d at 162. However:

> [s]ome of the factors which favor withdrawal include whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

Handy at 539, 391 S.E.2d at 163.

B. Record on Appeal

It is well-established that "[t]he appellate courts can judicially know only what appears of record." *State v. Price*, 344 N.C. 583, 593, 476 S.E.2d 317, 323 (1996) (internal quotation omitted). Thus, "[t]his Court's review on appeal is limited to what is in the record or in the designated verbatim transcript of proceedings. Rule 9(a), N.C. Rules App. Proc. An appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it." *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254 (1985). In this case, defendant's appellate arguments are largely based upon certain assertions which, upon examination of the record, we determine to be inaccurate. As a result, we find it necessary to clarify the factual history of this case, as reflected by the record on appeal.

The transcript of defendant's appearance in court on 8 June 2015 establishes that defendant asked to have counsel appointed and expressed a wish to resolve the pending charges that day if possible, as indicated in the following dialogue:

> THE COURT: Mr. Whitehurst, your new court date will be August 3rd.
>
> DEFENDANT: Is there any way I can handle it today? I was supposed to already have a lawyer.
>
> PROSECUTOR: We can see if anyone is able to talk to Mr. Whitehurst.

On appeal, defendant asserts that on 8 June 2015 he asked "if he could handle his case that day, so he could get out of jail," and that he "clearly stated when he was brought to court on 8 June 2015, that he wanted to handle his case that day, so he could get out of jail." On the basis of these contentions, defendant argues that defendant entered a plea of guilty "for the express purpose of getting out of jail" and that there is "no doubt that [defendant] would not have entered a guilty plea" had he not been in custody. (emphasis added). There is no support in the record for the assertion that defendant informed the trial court that he wanted to resolve his case promptly "so he could get out of jail." A review of the transcript shows that defendant neither mentioned the fact of his incarceration nor shared any other information related to his motivation for seeking a prompt resolution of the charges against him, and we disregard defendant's appellate contentions to the contrary.

As discussed above, the proceedings concluded on 8 June 2015 after defendant had pleaded guilty to obtaining property by false pretenses,

but before defendant had been sentenced. Defendant contends on appeal that the court recessed overnight because defendant "objected as the State was presenting the factual basis for his plea," and that "[w]ith [defendant] disputing the factual basis for his plea, the trial court decided to adjourn court for the day[.]" Defendant further asserts that "[w]hen [defendant] disputed the factual basis for his plea, the court halted the proceedings and ordered [defendant] returned to the jail until the following day."

However, the record does not support this assertion. The transcript includes no statements by defendant or his counsel indicating that defendant disputed the accuracy of the prosecutor's factual summary. We note that the prosecutor's summary included a recitation of items that had been stolen and were later sold to a pawn shop by defendant and two codefendants. After the prosecutor listed the stolen objects, the following dialogue took place:

> PROSECUTOR: Two shovels, a Pepsi hat, toys and bottles, a Pepsi thermometer and a Pepsi carton. And that would be the showing.
>
> THE COURT: Mr. Sellers?
>
> DEFENSE COUNSEL: Yes, your Honor.
>
> THE COURT: Anything as to the facts?
>
> DEFENSE COUNSEL: Your Honor, Mr. Whitehurst was aware of at least one thermometer. (indiscernible).
>
> THE COURT: Bring him back tomorrow. Mr. Sheriff, if you will adjourn us.

We discern nothing in this colloquy to indicate that defendant disputed the State's proffer of a factual basis for the charges. In fact, his counsel acknowledged that defendant was "aware of at least one thermometer" among the stolen items. We conclude that the record does not establish that defendant objected to the prosecutor's summary of the evidence and that the transcript does not indicate a specific reason for the court's decision to resume the proceedings on the following day. In considering the merits of defendant's appellate arguments, we will disregard his contention that defendant objected to the State's summary of the factual basis for the charges.

Defendant has also mischaracterized in two respects the proceedings that occurred on 9 June 2015. First, defendant repeatedly states on

appeal that when he appeared in court on 9 June 2015, "the trial court refused to hear" his case because he "was dressed inappropriately for court[,]" that he "was unable to enter the courtroom due to being inappropriately dressed," and that the trial court "would not hear [his] motion on June 9, 2015, because [he] was not dressed appropriately for court." The transcript, however, reflects that at the outset of the hearing on 9 June 2015, defendant's counsel noted that defendant was wearing shorts because he had just been released from custody, and asked that the sentencing be continued. When the prosecutor indicated that the parties might have a disagreement regarding the amount of restitution, the trial court granted the continuance that had been requested by defendant. The trial court neither "refused to hear" defendant's sentencing proceeding nor made any comment concerning defendant's appearance. This assertion is simply not supported by the record.

In addition, defendant repeatedly asserts that during defendant's brief appearance before the trial court on 9 June 2015, he "moved to withdraw his *Alford* plea entered the previous day[.]" Defendant contends that he "promptly" moved to set aside his plea, on the grounds that on the day after pleading guilty defendant "immediately came to court and asked to withdraw his *Alford* plea[.]" However, a review of the transcript of the court proceedings conducted on 9 June 2015 shows that neither defendant nor his trial counsel asked to withdraw his guilty plea or made any statements concerning defendant's satisfaction with the terms of the plea arrangement. In addition, the written motion for withdrawal of the guilty plea was filed on 3 August 2015, approximately 55 days after defendant entered his plea, rather than the next morning as defendant alleges. We conclude that there is no evidence that defendant moved to withdraw his plea of guilty prior to 3 August 2015.[1]

In sum, the record establishes the following: (1) On 8 June 2015, defendant expressed a desire to resolve the case on that day, but neither stated that he was motivated by a wish to be released from jail nor indicated any other specific reason for this course of action; (2) At the plea hearing conducted on 8 June 2015, defendant did not object to the prosecutor's summary of the factual support for the charges against defendant; (3) On 9 June 2015, the trial court did not express an opinion regarding defendant's clothing or refuse to consider defendant's

1. On 16 April 2016, eight months after defendant's sentencing hearing, the trial court signed a written order denying defendant's motion to withdraw his guilty plea, which included a finding that defendant moved to withdraw his guilty plea on 9 June 2015. We conclude that this finding, which is contradicted by the transcript of the 9 June 2015 hearing, was erroneously included in the written order.

sentencing hearing because of defendant's "inappropriate" attire; and (4) On 9 June 2015, defendant did not move to withdraw his plea of guilty or make any other representation regarding his satisfaction with the plea arrangement.

C. Discussion

[1] On appeal, defendant argues that the trial court erred by denying his motion to withdraw his plea of guilty on the grounds that at the hearing on 5 August 2015 he offered a "fair and just reason" for withdrawal. We disagree.

Defendant maintains that he "hastily entered his *Alford* plea while he was under duress." Defendant has not identified any evidence that his plea was entered in haste and defendant does not dispute that he was arrested on the present charges in April, 2015, and entered a plea of guilty more than a month later. We conclude that there is no evidence that defendant's plea was entered "hastily." Defendant's assertion that he entered a plea "under duress" is supported solely by the fact that defendant was in custody when he pleaded guilty. Defendant appears to suggest that any guilty plea entered while a defendant is incarcerated is entered under duress, because there is "no stronger form of coercion or duress than being held in jail against one's will." Defendant cites no authority for the proposition that the fact that a defendant is incarcerated is *per se* evidence of coercion, and we decline to adopt the position proposed by defendant.

Defendant argues next that he "promptly moved to withdraw his *Alford* guilty plea the next day" after its entry. We have concluded that the record shows that defendant moved to withdraw his plea of guilty on 3 August 2015, rather than on "the next day" after he pleaded guilty. On appeal, defendant does not explain his delay or offer any argument that his motion of 3 August 2015 should be treated as one that was made promptly after the entry of the plea. We conclude that defendant has failed to establish any right to relief on the basis of the timing of his motion to withdraw his plea of guilty.

[2] Defendant also contends that the "State's case against [him] was weak." The basis for this assertion is not entirely clear. On 8 June 2015, the prosecutor summarized the factual basis for the charges against defendant. The prosecutor stated that certain items were reported stolen by their owner; that defendant and two others pawned the items in a local pawn shop; and that the items were recovered at the pawn shop. The prosecutor's summary, which defendant does not challenge, indicates that the case against defendant was simple and straightforward.

Defendant does not identify evidentiary issues as to the identity of either the stolen items or the individuals who pawned them, and does not contend that the case presented complex legal or forensic issues. We conclude that defendant has failed to effectively challenge the strength of the State's evidence against him.

[3] In addition, defendant maintains that he "asserted his legal innocence by contesting the factual basis for his plea" and by entering an *Alford* plea. As discussed above, there is no evidence that defendant challenged the factual basis for his plea. Defendant also argues that his decision to enter an *Alford* guilty plea is evidence of his assertion of innocence. Defendant supports this contention with a quotation from *State v. Chery*, 203 N.C. App. 310, 314, 691 S.E.2d 40, 44 (2010), in which we held that, for purposes of analyzing the defendant's motion to withdraw his guilty plea, "there is no material difference between a no contest plea and an *Alford* plea." However, in *Chery* this Court *rejected* the defendant's argument that his entry of an *Alford* plea established his assertion of legal innocence:

> As one of the bases for his motion to withdraw his plea, defendant relies heavily upon the fact that he entered a no contest/*Alford* plea rather than pleading guilty to the conspiracy charge. . . . [Defendant] assert[s] that his plea, in and of itself, equated to a conclusive assertion of innocence. . . . We hold the fact that the plea that defendant seeks to withdraw was a no contest or an *Alford* plea does not conclusively establish the factor of assertion of legal innocence for purposes of the *Handy* analysis.

Chery, 203 N.C. App. at 314-15, 691 S.E.2d at 44. We conclude that defendant has failed to show that he has asserted his legal innocence. As a result, we do not consider this contention as a basis for withdrawal of his guilty plea.

[4] Defendant also asserts that the withdrawal of his guilty plea would not have prejudiced the State. However, defendant has not shown that the factors identified in *Handy* support withdrawal of his plea, and we conclude that defendant has failed to establish that he had a fair and just reason to withdraw his plea of guilty. "[T]he burden does not shift to the State to show prejudice until the defendant has established a fair and just reason existed to withdraw his plea. Because defendant has failed to meet his burden of showing a fair and just reason existed to withdraw his plea, we do not address prejudice against the State." *Chery*, 203 N.C. App. at 318, 691 S.E.2d at 46-47 (citations omitted).

III. Restitution

[5] Defendant next argues, and the State agrees, that the trial court erred by ordering him to pay restitution in the absence of any evidence to support the amount of restitution. We conclude that this argument has merit.

"The amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing. The unsworn statement of the prosecutor is insufficient to support the amount of restitution ordered." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (internal quotation and citation omitted).

In this case, the trial court signed an order directing defendant to pay $200 in restitution on 8 June 2015. No testimony was adduced as to the amount of restitution on 8 June 2015, and the record does not include any other evidence, such as a sworn affidavit, upon which the trial court could have based its restitution order. We conclude that the restitution order must be vacated and remanded to the trial court.

IV. Conclusion

For the reasons discussed above, we conclude that the trial court did not err by denying defendant's motion to withdraw his plea of guilty. We further conclude that the trial court erred in entering its restitution order.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge HUNTER concur.

US CHEMICAL STORAGE, LLC, PLAINTIFF
v.
BERTO CONSTRUCTION, INC., DEFENDANT

No. COA16-628

Filed 2 May 2017

1. Appeal and Error—appealability—interlocutory appeal—substantial right—forum selection clause

An interlocutory appeal was heard where it involved a forum selection clause, which is a substantial right.

2. Jurisdiction—personal—forum selection clause

The trial court erred by concluding that a forum selection clause was not binding upon plaintiff where a New Jersey corporation had chosen a North Carolina corporation as a subcontractor to provide hazmat and storage supply buildings. The contract, interpreted pursuant to New Jersey law, clearly contained a mandatory forum selection clause vesting exclusive jurisdiction in New York and New Jersey, not North Carolina.

3. Jurisdiction—personal—minimum contacts

A New Jersey corporation did not have sufficient minimum contacts with North Carolina to subject it to personal jurisdiction in North Carolina where the New Jersey corporation contracted with a North Carolina company for the manufacture and delivery of hazmat and supply storage buildings. There was no evidence that the New Jersey company knew that the buildings would be manufactured in North Carolina, and the mere fact that the New Jersey corporation had contracted with a North Carolina company a single time was not sufficient to create a reasonable anticipation that it may be haled into court here.

Judge INMAN concurring in part and dissenting in part.

Appeal by defendant from order entered 26 January 2016 by Judge Lindsay R. Davis, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 11 January 2017.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson and Jay Vannoy, for plaintiff-appellee.

Blanco Tackabery & Matamoros, P.A., by James E. Vaughan and M. Rachael Dimont, for defendant-appellant.

CALABRIA, Judge.

Where a forum selection clause, pursuant to New Jersey law, was valid, mandatory, and enforceable, the trial court erred in denying defendant's motion to dismiss. Where defendant's contacts with the State of North Carolina were insufficient to create personal jurisdiction, the trial court erred in denying defendant's motion to dismiss. We vacate and remand.

I. Factual and Procedural Background

Berto Construction, Inc. ("Berto") is a New Jersey corporation with its principal and only place of business located in Rahway, New Jersey. Berto performs concrete construction in the New Jersey-New York-Pennsylvania tristate area. As part of its business, Berto entered into a contract (the "Contract") with the Port Authority of New York and New Jersey (the "Port Authority") to perform construction. In connection with the Contract, the Port Authority required Berto to furnish and install hazmat and supply storage buildings. The Contract limited the suppliers for this project to one of five manufacturers, one of whom was US Chemical Storage, LLC ("US Chemical"). US Chemical is a North Carolina limited liability company. Berto chose US Chemical as its subcontractor, and the two entered into a subcontract agreement (the "Subcontract").

On 9 September 2015, US Chemical filed a complaint against Berto, alleging breach of contract. Specifically, US Chemical alleged that Berto had agreed to pay US Chemical $736,400.00, that US Chemical complied with its obligation under the Subcontract, and that Berto failed to pay an overdue balance of $199,344.25. In response to the complaint, Berto filed a motion to dismiss, pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure, alleging that the court lacked personal jurisdiction over Berto. In an affidavit in support of the motion, Douglas R. Birdsall ("Birdsall"), a project manager for Berto, alleged that Berto had had no contact with the State of North Carolina prior to its contract with US Chemical; that the Contract was explicitly subject to the jurisdiction and laws of New York and New Jersey; and that in the Subcontract US Chemical agreed to be bound by the terms of the Contract, including a specific provision providing that the Subcontract was subject to New Jersey law. Birdsall further averred

that US Chemical had failed to satisfactorily perform its work; that its submissions pertaining to the buildings required multiple revisions; that it supplied incorrect piping on three buildings; that it delivered a building to the wrong location; that it failed to provide certain pieces of equipment; that its defective submissions caused delay to the project; and that all of these defects and delays resulted in $180,933.80 in increased costs to Berto, and the possibility of Berto being assessed for liquidated damages by the Port Authority. Additional arguments, both on the forum selection provision and Berto's minimum contacts, were presented at a hearing on Berto's motion to dismiss.

On 26 January 2016, the trial court entered an order on Berto's motion to dismiss. The trial court found that the Subcontract "provided that it would be governed by New Jersey law and that the plaintiff would be bound to the defendant by the terms of the defendant's contract with the Port Authority[;]" and that the Contract "provided that the defendant agreed to 'irrevocably submit[ ] [it]self to the jurisdiction of the Courts of the State of New York and to the jurisdiction of the Courts of the State of New Jersey in regard to any controversy' arising out of the project." The trial court then noted that the Subcontract "did not provide, however, that the parties selected these courts as the exclusive jurisdictions for any disputes arising out of the project[,]" and concluded that US Chemical's suit "is not barred by the parties' subcontract, because the forum selection clause is permissive, not mandatory[.]" With respect to minimum contacts, the trial court noted that

> North Carolina extends the jurisdiction of its courts to actions arising out of "services actually performed . . . for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant"; and actions relating to "goods . . . or other things of value shipped from this State by the plaintiff to the defendant on his order or direction." N.C. Gen. Stat. § 1-75.4(5)(b), (d).

The trial court found that, with Berto's knowledge, US Chemical "designed and constructed twelve hazmat and supply storage buildings at its plant in North Carolina[;]" and that "[t]he buildings were shipped from the plaintiff's facility in North Carolina to the defendant[.]" The trial court therefore concluded that the action arose "out of services actually performed by the plaintiff within North Carolina for the defendant," and that it "relates to goods and things of value shipped from North Carolina by the plaintiff to the defendant on its order or direction," and thus that "personal jurisdiction is extended by N.C. Gen. Stat. § 1-75.4(5)(b) & (d)."

The trial court concluded that the Contract and Subcontract did not grant exclusive jurisdiction to New York or New Jersey, that Berto purposefully availed itself of the privilege of doing business in North Carolina, and that its contacts were sufficient to establish personal jurisdiction. It therefore denied Berto's motion to dismiss.

Berto appeals.

II. Interlocutory Appeal

[1] As a preliminary matter, we note that this is an interlocutory appeal.

> "The denial of a motion to dismiss is an interlocutory order which is not immediately appealable unless that denial affects a substantial right of the appellant." *Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008). "The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature." *Hamilton v. Mortgage Information Services*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011) (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)). Thus, the extent to which an appellant is entitled to immediate interlocutory review of the merits of his or her claims depends upon his or her establishing that the trial court's order deprives the appellant of a right that will be jeopardized absent review prior to final judgment. *Id.*; *see also Harbour Point Homeowners' Ass'n, Inc. v. DJF Enters., Inc.*, 206 N.C. App. 152, 157, 697 S.E.2d 439, 444 (2010).

Richmond Cty. Bd. of Educ. v. Cowell, 225 N.C. App. 583, 585, 739 S.E.2d 566, 568 (2013). Thus, in order for us to hear Berto's appeal, Berto must establish the existence of a substantial right.

Berto correctly argues that the validity of a forum selection clause constitutes a substantial right. *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 776, 501 S.E.2d 353, 355 (1998) (holding that the trial court's denial of a defendant's motion to dismiss based on a forum selection clause was appealable). Similarly, Berto correctly argues that N.C. Gen. Stat. § 1-277(b) guarantees the right to immediately appeal an adverse ruling with respect to the jurisdiction of the court over a person or property based upon minimum contacts. *See Credit Union Auto Buying Servs., Inc. v. Burkshire Props. Grp. Corp.*, ___ N.C. App. ___, ___, 776 S.E.2d 737, 739 (2015) (holding that N.C. Gen. Stat. § 1-277(b) guarantees a right

to immediate appeal that is limited to minimum contacts questions, the subject matter of Rule 12(b)(2)). We hold that Berto has demonstrated the existence of a substantial right that would be jeopardized absent review, and consider Berto's interlocutory appeal.

III. Standard of Review

> "The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Sec., LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005).
>
> . . .
>
> "[I]f the defendant supplements his motion to dismiss with an affidavit or other supporting evidence, the allegations [in the complaint] can no longer be taken as true or controlling and plaintiff[ ] cannot rest on the allegations of the complaint." *Id.* (second and third alterations in original) (internal quotation marks omitted).

Parker v. Town of Erwin, ___ N.C. App. ___, ___, 776 S.E.2d 710, 720-21 (2015).

IV. Analysis

In two separate arguments, Berto contends that the trial court erred in denying its motion to dismiss. We agree.

A. Forum Selection Clause

[2] First, Berto contends that the trial court erred in denying its motion to dismiss based upon the purported forum selection clause. A trial court's interpretation of a forum selection clause is an issue of law that is reviewed *de novo*. *Sony Ericsson Mobile Commc'ns USA, Inc. v. Agere Sys., Inc.*, 195 N.C. App. 577, 579, 672 S.E.2d 763, 765 (2009).

Berto contends that the language of the Contract and the Subcontract clearly and explicitly bound US Chemical to litigate exclusively in the courts of New York or New Jersey. The Contract, parts of which are included in the record on appeal, contains the following provision:

> The Contractor hereby irrevocably submits himself to the jurisdiction of the Courts of the State of New York and to the jurisdiction of the Courts of the State of New Jersey in regard to any controversy arising out of connected with, or in any way concerning the Proposal or this Contract.

This provision was purportedly integrated into the Subcontract by the following language:

> The Subcontractor/Supplier agrees to be bound to the Contractor by the terms and conditions of the Contractor's agreement with the Owner, a copy of said agreement being available for inspection at the office of the Contractor.

The Subcontract further stated that "[t]his contract shall be governed by the laws of the State of New Jersey."

The trial court entered findings consistent with all of these facts, but found nonetheless that "[t]he subcontract did not provide, however, that the parties selected these courts as the exclusive jurisdictions for any dispute arising out of the project." The trial court therefore concluded that this language did not bar suit by US Chemical, "because the forum selection clause is permissive, not mandatory[.]"

There is no question that, under the Subcontract, US Chemical agreed that the Subcontract would be "governed by the laws of the State of New Jersey." Further, under New Jersey law, language in an agreement providing that the parties "irrevocably consent[] and submit[] to the jurisdiction of the courts of the State of New Jersey" constitutes an enforceable forum selection clause. *See Hendry v. Hendry*, 339 N.J. Super. 326, 334, 771 A.2d 701, 706 (N.J.Super.A.D. 2001). Additionally, New Jersey courts have allowed a contractual provision to include a forum selection clause by reference. For example, in *Asphalt Paving Sys., Inc. v. Gen. Combustion Corp.*, 2015 WL 167378 (D.N.J. 2015), the plaintiff, Asphalt Paving Systems, entered into a contract with the defendant, General Combustion. The contract provided that it was subject to the standard terms and conditions of third party Gencor. Those terms included a forum selection clause vesting exclusive jurisdiction in Orange County, Florida. *Id.* at *2. The United States District Court, applying the laws of New Jersey, concluded that the forum selection clause was "valid, mandatory, and enforceable." *Id.* at *5.

The Contract, as interpreted pursuant to New Jersey law, clearly contains a mandatory forum selection clause, vesting exclusive jurisdiction in New York and New Jersey, not North Carolina. The Subcontract, as interpreted pursuant to New Jersey law, clearly integrates that mandatory forum selection clause by reference. As such, the trial court erred in concluding that the forum selection clause was not binding upon US Chemical, and in denying Berto's motion to dismiss.

B. Minimum Contacts

[3] Second, Berto contends that the trial court erred in denying its motion to dismiss based upon the trial court's lack of jurisdiction. Specifically, Berto contends that it lacked the minimum contacts necessary for the court to establish jurisdiction.

> "The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]" *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). " 'Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.' " *Nat'l Util. Review, LLC v. Care Ctrs., Inc.*, 200 N.C. App. 301, 303, 683 S.E.2d 460, 463 (2009) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). We review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant. *Id.*

Bell v. Mozley, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011).

Berto contends that, in rendering its findings of fact with respect to minimum contacts, the trial court failed to consider a number of undisputed facts. However, our standard of review is not whether the trial court made certain findings, but rather whether the findings it *did* make were supported by competent evidence in the record. Notably, the only finding of fact with which Berto takes issue is the trial court's finding that Berto knew that US Chemical, a North Carolina company, would construct its buildings in North Carolina. Upon review of the record, we agree.

There is evidence in the record that Berto, on this single occasion, entered into a contract with a North Carolina company. There is no evidence, however, that Berto knew that the product it purchased would be manufactured in North Carolina. Neither Birdsall's affidavit nor the testimony elicited at the hearing on Berto's motion to dismiss supports a determination that Berto knew that the product it was purchasing would be manufactured in North Carolina.

As the trial court observed in its order, our Supreme Court has addressed a substantially similar matter. In *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 348 S.E.2d 782 (1986), the plaintiff, a North

Carolina clothing manufacturer, sued the defendant, a clothing distributor incorporated in New Jersey and doing business in New York. The defendant moved to dismiss based upon, *inter alia*, lack of personal jurisdiction, and when this motion was denied, the defendant appealed. On appeal, our Supreme Court held that the defendant's interactions with the plaintiff created minimal contacts, observing:

> Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this State. In the instant case, the defendant made an offer to plaintiff whom defendant knew to be located in North Carolina. Plaintiff accepted the offer in North Carolina. The contract was therefore made in North Carolina, as we discussed earlier. The contract was for specially manufactured goods, shirts in this case, for which plaintiff was to be paid over $44,000. Defendant was told that the shirts would be cut in North Carolina, and defendant also agreed to send its personal labels to plaintiff in North Carolina for plaintiff to attach to the shirts. Defendant was thus aware that the contract was going to be substantially performed in this State. The shirts were in fact manufactured in and shipped from this State. After defendant contacted the plaintiff to complain about the shirts, defendant then returned them to this State. We therefore conclude that the contract between defendant and plaintiff had a "substantial connection" with this State. We further conclude that by making an offer to the North Carolina plaintiff to enter a contract made in this State and having a substantial connection with it, defendant purposefully availed itself of the protection and benefits of our laws.

Id. at 367, 348 S.E.2d at 786-87 (citations omitted).

Notwithstanding the similarities between the two cases, the instant case is distinguishable from *Tom Togs* in one very specific way: The defendant in *Tom Togs* "was told that the shirts would be cut in North Carolina, and defendant also agreed to send its personal labels to plaintiff in North Carolina for plaintiff to attach to the shirts. Defendant was thus aware that the contract was going to be substantially performed in this State." *Id.* at 367, 348 S.E.2d at 787. In the instant case, however, there

was no such evidence in the record. The only evidence of contact was the fact that Berto knowingly contracted with a North Carolina company. Any other finding that Berto had contacts with this State is an inference unsupported by the evidence.

To establish minimum contacts with the forum state, the "relationship between the defendant and the forum must be such that he should reasonably anticipate being haled into court there." *Id.* at 365-66, 348 S.E.2d at 786 (citation and quotation marks omitted). The mere fact that a defendant has contracted with a North Carolina company one single time is insufficient to create in the defendant a reasonable anticipation. We therefore hold that Berto did not have sufficient minimum contacts with the State of North Carolina to subject it to personal jurisdiction here. The trial court erred in denying Berto's motion to dismiss.

V. Conclusion

The Subcontract, by its terms, was properly governed by New Jersey law. Pursuant to New Jersey law, the forum selection provision of the Contract was properly integrated into the Subcontract, and was valid, mandatory, and enforceable between Berto and US Chemical. Additionally, there was insufficient evidence in the pleadings and produced at the hearing to demonstrate that Berto had minimum contacts with the State of North Carolina necessary to support personal jurisdiction. For both reasons, the trial court erred in denying Berto's motion to dismiss. The trial court's order denying Berto's motion is vacated, and this matter is remanded to the trial court.

VACATED AND REMANDED.

Judge McCULLOUGH concurs.

Judge INMAN concurs in part and dissents in part in a separate opinion.

Judge Douglas McCullough concurred in this opinion prior to 24 April 2017.

INMAN, Judge, concurring in part and dissenting in part.

I concur with the majority's holding that New Jersey law governs the enforceability of the Subcontract between US Chemical and Berto, including the forum selection clause incorporated by reference in the

Subcontract, so that US Chemical is prohibited from bringing its suit against Berto in North Carolina. However, I write separately to explain why New Jersey law applies, because its application to determine the validity of the forum selection clause is not dictated by the choice of law provision in the Subcontract. I dissent in part because I disagree with the majority's holding that Berto has not made sufficient minimum contacts with North Carolina to subject it to the jurisdiction of our courts.

I. Forum Selection Clause

We apply *de novo* review to the trial court's interpretation of a forum selection clause. *Sony Ericsson Mobile Commc'ns. USA, Inc. v. Agere Sys.*, 195 N.C. App. 577, 579, 672 S.E.2d 763, 765 (2009) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (internal quotation marks and citations omitted).

N.C. Gen. Stat. § 22B-3 provides, in pertinent part, that "any provision in a contract entered into in North Carolina that requires the prosecution of any action . . . to be instituted or heard in another state is against public policy and is void and unenforceable." N.C. Gen. Stat. § 22B-3 (2015). Accordingly, if the Subcontract between US Chemical and Berto was made in North Carolina, the forum selection clause in the contract would be void and unenforceable. On the other hand, if the Subcontract was made outside North Carolina, the statutory bar would not apply.

"The general principle recognized in all jurisdictions is that ordinarily the execution, interpretation and validity of a contract is to be determined by the law of the State or county in which it is made." *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 516, 157 S.E. 860, 863 (1931). In *Bundy*, the defendant, a Maryland company, appealed from a jury verdict awarding the receiver of an insolvent North Carolina company compensation for interest charged and paid in violation of North Carolina's usury laws. *Id.* at 513-14, 157 S.E. at 861-62. The defendant argued that because the contract was entered into in Maryland, where the interest charged was lawful, the trial court applied the wrong law. *Id.* at 515-16, 157 S.E. at 862. The North Carolina Supreme Court, citing testimony presented before the trial court that the last signature on the contract was made in Baltimore, held that "it is clear that the contract was executed in Baltimore, Maryland, because the last act essential to the completion of the agreement was performed at that place." *Id.* at 515, 157 S.E. at 862. The Supreme Court further explained that

> the test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of the minds. Until this act was done there was no contract, and upon its being done at a given place, the contract became existent at the place where the act was done.

Id. (internal quotation marks and citation omitted).

Although *Bundy* pre-dated N.C. Gen. Stat. § 22B-3, its reasoning has been followed in modern decisions interpreting forum selection clauses. In *Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 187-88, 606 S.E.2d 728, 733 (2005), this Court upheld a Florida forum selection clause because the franchise agreement at issue was last signed by the defendant in Florida. "Just as in *Bundy*, the last act of signing the contract was an essential element to formation. As the contract was formed in Florida, N.C. Gen. Stat. § 22B-3 does not apply to the forum selection clause in the instant agreement." *Id.* at 187, 606 S.E.2d at 733.

Here, the trial court did not make a factual finding of where the contract was made, and the Subcontract does not indicate where it was signed. It appears on the face of the Subcontract that it was signed first by a representative of US Chemical on 1 October 2012 and last by a representative of Berto on 9 October 2012. Berto argues on appeal that because US Chemical's representative admitted in testimony before the trial court that no one from Berto ever came to North Carolina in connection with the Subcontract, this Court should determine on appellate review that the Subcontract was signed last outside of North Carolina. Ordinarily the issue of where a specific action—such as the signing of a document—occurred would seem to be factual and beyond the scope of review of this Court. However, in light of the holding in *Bundy*, which was explicitly based upon trial testimony, and the holding of *Szymczyk*, which followed *Bundy* and did not cite any factual finding by the trial court on this issue, I find Berto's argument compelling in the absence of any contrary evidence offered by US Chemical.

II. Minimum Contacts

Because I concur with the majority's holding that the forum selection clause incorporated by reference in the Subcontract precludes US Chemical from bringing suit alleging breach of the Subcontract against Berto in North Carolina, I believe it is unnecessary for this Court to reach the issue of personal jurisdiction. However, because the majority reaches that issue and holds that Berto had not made minimum contacts with North Carolina to subject it to the jurisdiction of our courts, I respectfully dissent.

I would hold that Berto made sufficient minimum contacts with North Carolina to subject itself to the jurisdiction of our courts because Berto initiated contact with a North Carolina manufacturer and entered into an agreement for the North Carolina manufacturer to design and construct storage buildings and ship them from North Carolina to New York.

The trial court's finding that Berto's project manager contacted US Chemical in North Carolina to propose the Subcontract is undisputed and binding on appeal. Berto's trial counsel admitted in argument to the trial court that "Berto researched the different potential subcontractors" approved by the Port Authority and then contacted US Chemical. US Chemical's representative testified before the trial court that at all relevant times, US Chemical has had only one manufacturing facility, in Wilkesboro, North Carolina. Because the most basic research of any manufacturing company to perform the Subcontract would include at least a cursory assessment of the manufacturing facility—*i.e.*, where the manufacturer would perform the vast majority of its contractual duties—the evidence presented to the trial court was competent and sufficient to support the trial court's finding that "[w]ith the defendant's knowledge, the plaintiff designed and constructed twelve hazmat and supply storage buildings at its plant in North Carolina pursuant to the subcontract."

Additional evidence before the trial court revealed that very little of the work performed pursuant to the Subcontract occurred outside of North Carolina. US Chemical's contractual duties did not include off-loading the shipment of storage buildings or installing the storage buildings. The only service performed by US Chemical on site at the Port Authority was to adjust shelving inside the buildings. Because I agree with the trial court's conclusion that the action arises out of services actually performed by US Chemical within North Carolina for Berto, and relates to goods and things of value shipped from North Carolina by US Chemical to Berto on Berto's order or direction, I would hold that Berto is subject to personal jurisdiction based on North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4(5)(b) & (d) (2015). I also agree with the trial court's conclusion that Berto purposefully availed itself of the privilege of doing business in North Carolina and that its contacts with North Carolina were sufficient to satisfy the due process requirement of the United States Constitution.

WIDENI77, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, AND I-77 MOBILITY PARTNERS LLC, AND STATE OF NORTH CAROLINA, DEFENDANTS

No. COA16-818

Filed 2 May 2017

1. Constitutional Law—North Carolina—legislature—delegation of power

The delegation of power by the N.C. Department of Transportation for a traffic congestion management project was constitutional where the legislative goals and polices set forth in the statute, combined with procedural safeguards, were sufficient.

2. Constitutional Law—North Carolina—public purpose—traffic congestion relief project

The trial court did not err by concluding that expenditures from a traffic congestion improvement project that would include tolls constituted a public purpose pursuant to Article V, Section 2(1) of the North Carolina Constitution.

3. Highways and Streets—toll roads—number of toll roads not reduced

A highway congestion management project that included tolls did not violate N.C.G.S. § 136-89.199, the Turnpike Statute, where the project did not reduce the number of non-toll general purpose lanes.

4. Highways and Streets—toll roads—Turnpike statute—not applicable

The Turnpike Statue, N.C.G.S. § 136-89(5), did not apply to a traffic congestion management project that was governed by N.C.G.S. § 136-89.18(39) et seq., the P3 Statute, which begins "Notwithstanding the provisions of N.C.G.S. § 89-136-89(a)(5)."

5. Taxation—highway tolls—not a tax

The Court of Appeals rejected plaintiff's argument that the General Assembly unconstitutionally delegated its power to tax by authorizing tolls as a part of a highway congestion management program. It has previously been settled in N.C. that a toll is not a tax.

Appeal by plaintiff from order entered 24 February 2016 by Judge W. Osmond Smith III in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 February 2017.

Arnold & Smith, PLLC, by Paul A. Tharp and Matthew R. Arnold, for plaintiff.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the North Carolina Department of Transportation and the State of North Carolina.

Gibson, Dunn & Crutcher LLP, by Mitchell A. Karlan and Jerilin Buzzetta, and Parker Poe Adams & Bernstein LLP, by Michael G. Adams and Morgan H. Rogers, for I-77 Mobility Partners LLC.

CALABRIA, Judge.

WidenI77 ("plaintiff") appeals from an order granting summary judgment in favor of the North Carolina Department of Transportation ("NCDOT"), I-77 Mobility Partners LLC ("Mobility"), and the State of North Carolina ("State") (collectively referred to as "defendants") and dismissing plaintiff's claims with prejudice. For the reasons stated herein, we affirm the order of the trial court.

I. Background

On 26 June 2014, NCDOT and Mobility, a Delaware limited liability company, entered into a comprehensive agreement (the "Comprehensive Agreement") for the I-77 HOT Lanes Project (the "Project"). The I-77 corridor is "one of the most congested corridors in the [S]tate" and the Project offered a "comprehensive congestion management solution for approximately [twenty-six] miles of the I-77 corridor through the use of HOV3+ policy and managed lanes and supports future expansion of transit." The Comprehensive Agreement was a product of the State's "desires to facilitate private sector investment and participation in the development of the State's transportation system via public-private partnership agreements[]" pursuant to N.C. Gen. Stat. § 136-18(39) *et seq.* ("the P3 Statute").

The P3 Statute provides, in pertinent part, that the NCDOT is vested with the power to

> enter into partnership agreements with private entities, and authorized political subdivisions to finance, by tolls,

> contracts, and other financing methods authorized by law, the cost of acquiring, constructing, equipping, maintaining, and operating transportation infrastructure in this State, and to plan, design, develop, acquire, construct, equip, maintain, and operate transportation infrastructure in this State.

N.C. Gen. Stat. § 136-18(39) (2015).

Through the Comprehensive Agreement, NCDOT granted Mobility "the exclusive right, and [Mobility] accepts the obligation, to finance, develop, design, construct, operate and maintain the Project[.]" This included the exclusive right to impose tolls and incidental charges upon the users of the High Occupancy Toll ("HOT") lanes; to establish, modify, and adjust the rate of such tolls and incidental charges in accordance with law; and to enforce and collect the tolls and incidental charges from the users of the HOT lanes in accordance with the terms and conditions of the Comprehensive Agreement.

On 20 January 2015, plaintiff filed a "Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief." Plaintiff sought a declaration as to the constitutionality of the P3 Statute and the Comprehensive Agreement between the NCDOT and Mobility. Plaintiff's arguments included the following, *inter alia*: the General Assembly unconstitutionally delegated authority to the NCDOT to set toll rates without adequate standards and safeguards for which to exercise that power, to contract with Mobility and allow an unlimited rate of return on investment, and to contract with Mobility and allow the NCDOT and the State to compensate Mobility for its tax liabilities; violation of taxing power; violation of the public purpose doctrine; violation of due process; contrary to public policy; lack of authority; illegal contract; and motion for preliminary and permanent injunction.

On 9 March 2015, the trial court entered an order finding that plaintiff "ha[d] not shown a sufficient likelihood of success on the merits to justify granting a preliminary injunction" and denying plaintiff's motion for a preliminary injunction.

On 15 June 2015, Mobility filed a motion for summary judgment. On 19 June 2015, the State and the NCDOT filed a motion for summary judgment. On 13 November 2015, plaintiff filed a motion for summary judgment.

On 24 February 2016, the trial court entered an order concluding as follows:

> 4. As to the Motions for Summary Judgment filed by each party, it should be noted that it is not within the province, function or duty of the Court to determine the desirability or wisdom of the legislation or the contract at issue. These policy decisions are within the purview of the legislature and the North Carolina Department of Transportation. The subject legislation is not unconstitutional as applied, nor is the contract unlawful.
>
> 5. As to the Motions for Summary Judgment filed by each party, there is no genuine issue as to any material fact, that Defendants are entitled to a judgment as a matter of law, and that Plaintiff is not entitled to judgment as a matter of law.

Accordingly, the trial court granted defendants' motions for summary judgment and denied plaintiff's motion for summary judgment. Plaintiff's claims were dismissed with prejudice.

On 22 March 2016, plaintiff filed notice of appeal.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986) (citation omitted). Rule 56 of the North Carolina Rules of Civil Procedure provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

> The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense . . . or by showing through discovery that the opposing party

> cannot produce evidence to support an essential element of her claim[.]

Dobson v. Harris, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

III. Discussion

On appeal, plaintiff argues that the trial court erred by: (A) concluding that the North Carolina General Assembly's delegation of power to the NCDOT and NCDOT's arrangement with Mobility did not constitute an unconstitutional delegation of power; (B) concluding that the expenditure by the NCDOT and the State served a public purpose and was constitutional under Article V, Section 2(1) of the North Carolina Constitution; (C) concluding that the Comprehensive Agreement did not violate the Turnpike Statute; and (D) concluding that the North Carolina General Assembly did not unconstitutionally delegate its authority to tax to the NCDOT in violation of Article I, Section 8 and Article II, Section 23 of the North Carolina Constitution and the Due Process Clause of the United States Constitution. We address each argument in turn.

A. Delegation of Power

[1] Plaintiff argues that the trial court erred by concluding that the General Assembly's delegation of power to the NCDOT and NCDOT's arrangement with Mobility did not constitute an unconstitutional delegation of power. Specifically, plaintiff contends that the General Assembly's delegation of power pursuant to the P3 Statute "features an absolute, unfettered, unlimited, unilateral and therefore unconstitutional delegation of authority to an agency and private company." Plaintiff maintains that the P3 Statute grants unto Mobility the absolute authority to set toll rates without any meaningful input or control by the NCDOT or General Assembly. We are not convinced by plaintiff's arguments.

"It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional - but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 892 (1961) (citation omitted). "In passing upon the constitutionality of a legislative act it is not for this Court to judge its wisdom and expediency. These matters are the province of the General Assembly. Rather, it is the Court's duty to determine whether the legislative act in question exceeds constitutional limitation or prohibition." *Adams v. N.C. Dep't of Natural & Econ. Res.*, 295 N.C. 683, 690, 249 S.E.2d 402, 406 (1978).

In our determination of whether the P3 Statute violates the rule that the General Assembly cannot delegate its power to legislate, we are directed by *Adams*.

> Although this Court noted in *Adams* that the legislature may not abdicate its power to make laws [or] delegate its supreme legislative power to any . . . coordinate branch or to any agency which it may create, we also concluded that strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers[.]

Conner v. N.C. Council of State, 365 N.C. 242, 250-51, 716 S.E.2d 836, 842 (2011) (citations and internal quotation marks omitted) (emphasis in original).

> [T]he constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers.
>
> . . . .
>
> In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted that such declarations need be only as specific as the circumstances permit. When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.
>
> Additionally, in determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to

> insure that the decision-making by the agency is not arbitrary and unreasoned.

Adams, 295 N.C. at 697-98, 249 S.E.2d at 410-11 (internal citations and quotation marks omitted).

In the case *sub judice*, the P3 Statute provides as follows, in pertinent part:

> The said Department of Transportation is vested with the following powers:
>
> . . . .
>
> (39) To enter into partnership agreements with private entities . . . to finance, by tolls, contracts, and other financing methods authorized by law, the cost of acquiring, constructing, equipping, maintaining, and operating transportation infrastructure in this State, and to plan, design, develop, acquire, construct, equip, maintain, and operate transportation infrastructure in this State. An agreement entered into under this subdivision requires the concurrence of the Board of Transportation. The Department shall report to the Chairs of the Joint Legislative Transportation Oversight Committee, the Chairs of the House of Representatives Appropriations Subcommittee on Transportation, and the Chairs of the Senate Appropriations Committee on the Department of Transportation, at the same time it notifies the Board of Transportation of any proposed agreement under this subdivision. . . .
>
> . . . .
>
> (39a) a. The Department of Transportation . . . may enter into up to three agreements with a private entity as provided under subdivision (39) of this section for which the provisions of this section apply.
>
> b. A private entity or its contractors must provide performance and payment security in the form and in the amount determined by the Department of Transportation. . . .
>
> . . . .
>
> d. Article 6H of Chapter 136 of the General Statutes shall apply to the Department of Transportation

and to projects undertaken by the Department of Transportation under subdivision (39) of this section. The Department may assign its authority under [Article 6H of Chapter 136 of the General Statutes] to fix, revise, charge, retain, enforce, and collect tolls and fees to the private entity.

e. Any contract under this subdivision or under Article 6H of this Chapter for the development, construction, maintenance, or operation of a project shall provide for revenue sharing, if applicable, between the private party and the Department, and revenues derived from such project may be used as set forth in G.S. 136-89.188(a), notwithstanding the provisions of G.S. 136-89.188(d). . . .

. . . .

f. Agreements entered into under this subdivision shall comply with the following additional provisions:

1. The Department shall solicit proposals for agreements.

2. Agreement shall be limited to no more than 50 years from the date of the beginning of operations on the toll facility.

3. Notwithstanding the provisions of G.S. 136-89.183(a)(5), all initial tolls or fees to be charged by a private entity shall be reviewed by the Turnpike Authority Board. Prior to setting toll rates, either a set rate or a minimum and maximum rate set by the private entity, the private entity shall hold a public hearing on the toll rates, including an explanation of the toll setting methodology, in accordance with guidelines for the hearing developed by the Department. After tolls go into effect, the private entity shall report to the Turnpike Authority Board 30 days prior to any increase in toll rates or change in the toll setting methodology by the private entity from the previous toll rates or toll setting methodology last reported to the Turnpike Authority Board.

. . . .

> 6. The Turnpike Authority annual report under G.S. 136-89.193 shall include reporting on all revenue collections associated with projects subject to this subdivision under the Turnpike Authority.
>
> 7. The Department shall develop standards for entering into comprehensive agreements with private entities under the authority of this subdivision and report those standards to the Joint Legislative Transportation Oversight Committee on or before October 1, 2013.

N.C. Gen. Stat. §§ 136-18(39), (39a)(a)-(b), (39a)(d)-(e), and (39a)(f) (2015).

Guided by the principles stated in *Adams*, we hold that the legislative goals and policies set forth in the P3 Statute, combined with its procedural safeguards, are sufficient to withstand a constitutional challenge.

We are mindful that "there [exists] a strong presumption that enactments of the General Assembly are constitutional." *Town of Spruce Pine v. Avery County*, 346 N.C. 787, 792, 488 S.E.2d 144, 147 (1997).

The General Assembly has provided that it is the policy that:

> [t]he [NCDOT] shall develop and maintain a statewide system of roads, highways, and other transportation systems commensurate with the needs of the State as a whole and it shall not sacrifice the general statewide interest to the purely local desires of any particular area.

N.C. Gen. Stat. § 136-44.1 (2015). Article 6H of Chapter 136 of the General Statutes, applied to the NCDOT and to projects undertaken by the NCDOT under the P3 Statute pursuant to N.C. Gen. Stat. § 136-18(39a)(d), states that:

> The General Assembly finds that the existing State road system is becoming increasingly congested and overburdened with traffic in many areas of the State; that the sharp surge of vehicle miles traveled is overwhelming the State's ability to build and pay for adequate road improvements; and that an adequate answer to this challenge will require the State to be innovative and utilize several new approaches to transportation improvements in North Carolina.

> Toll funding of highway and bridge construction is feasible in North Carolina and can contribute to addressing the critical transportation needs of the State. A toll program can speed the implementation of needed transportation improvements by funding some projects with tolls.

N.C. Gen. Stat. § 136-89.180 (2015).

It is clear that achievement of this stated legislative policy and the fixing, revising, charging, retaining, enforcing, and collecting of tolls require expertise. It would be impractical to require the General Assembly to provide a "detailed agenda covering every conceivable problem which might arise in the implementation of the legislation." *Adams*, 295 N.C. at 698, 249 S.E.2d at 411; *see Bring v. North Carolina State Bar*, 348 N.C. 655, 659, 501 S.E.2d 907, 910 (1998) (stating that "[i]t is not practical for the General Assembly to micromanage the making of rules for the Board [of Law Examiners] such as what law schools are to be approved. The directions given by the legislature are as specific as the circumstances require"). Our Supreme Court has previously stated that "[a]s a practical matter tolls require little legislative regulation. If they are unreasonably high, motorists will boycott the turnpike; if they are unreasonably low, the bondholders will register their objections in some appropriate manner." *N.C. Turnpike Authority v. Pine Island, Inc.*, 265 N.C. 109, 115, 143 S.E.2d 319, 324 (1965).

Here, the General Assembly has enacted specific guiding standards within the P3 Statute to govern the NCDOT's exercise of the delegated powers. For example, the following standards, *inter alia*, exist to provide direction to the NCDOT for the Project: the NCDOT may assign its authority to fix, revise, charge, retain, enforce, and collect tolls and fees to the private entity under N.C. Gen. Stat. § 136-18(39a)(d); the private entity or its contractors must provide performance and payment security in the form and in the amount determined by the NCDOT under N.C. Gen. Stat. § 136-18(39a)(b); any contract under the P3 Statute shall provide for revenue sharing, if applicable, between the private party and the NCDOT pursuant to N.C. Gen. Stat. § 136-18(39a)(e); the NCDOT must solicit proposals for agreements under N.C. Gen. Stat. § 136-18(39a)(f)(1); the agreement shall be limited to no more than fifty years under N.C. Gen. Stat. § 136-18(39a)(f)(2); and the NCDOT shall develop standards for entering into comprehensive agreements with private entities under the P3 Statute and report those standards to the Joint Legislative Transportation Oversight Committee pursuant to N.C. Gen. Stat. § 136-18(39a)(f)(7). Considering the preceding guidelines, we hold that the directions given by the General Assembly are as specific as the circumstances require.

Furthermore, we hold that there are adequate procedural safeguards in the P3 Statute to ensure adherence to the legislative standards. N.C. Gen. Stat. § 136-18(39a)(f)(3) provides that all initial tolls or fees to be charged by a private entity shall be reviewed by the Turnpike Authority Board. Prior to setting toll rates, the private entity must hold a public hearing on the toll rates, including an explanation of the toll setting methodology, in accordance with hearing guidelines developed by the NCDOT. N.C. Gen. Stat. § 136-18(39a)(f)(3). After the tolls go into effect, Mobility must report to the Turnpike Authority Board thirty days prior to any increase in toll rates or change in the toll setting methodology from the previous toll rates or toll setting methodology last reported to the Turnpike Authority Board. *Id.* N.C. Gen. Stat. § 136-18(39a)(f)(5) also states that sixty days prior to the signing of a concession agreement subject to the P3 Statute, the NCDOT must report to the Joint Legislative Oversight Committee, providing such things as a description of the project, number of years the tolls will be in place, and demonstrated ability of the project team to deliver the project. N.C. Gen. Stat. § 136-18(39a)(f)(5). These procedural safeguards, *inter alia*, ensure that the NCDOT carries out the Project consistent with the policies of the General Assembly.

Based on the foregoing, we conclude that there are adequate guiding standards and procedural safeguards in place to regulate the exercise of authority for this Project. Accordingly, we hold that the trial court did not err by concluding that the General Assembly's delegation of power to the NCDOT constituted a constitutional delegation of power.

B. Public Purpose

[2] Plaintiff's second argument on appeal is that the trial court erred by concluding that the Project's expenditures constituted a public purpose pursuant to Article V, Section 2(1) of the North Carolina Constitution. Plaintiff relies on the holding in *Foster v. North Carolina Medical Care Commission*, 283 N.C. 110, 195 S.E.2d 517 (1973), for his contentions.

Article V, Section 2(1) of the North Carolina Constitution provides that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away. Although the constitutional language speaks of the 'power of taxation,' the limitation has not been confined to government use of tax revenues." *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 643, 386 S.E.2d 200, 205 (1989).

"The initial responsibility for determining what is and what is not a public purpose rests with the legislature; its determinations are entitled

to great weight." *Id.* at 644-45, 386 S.E.2d at 206. "[T]he presumption favors constitutionality. Reasonable doubt must be resolved in favor of the validity of the act." *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996) (citations omitted).

The General Assembly's adoption of the P3 Statute leaves no doubt that our legislature has determined that the NCDOT's partnership agreements with private entities to finance the cost of acquiring, constructing, equipping, maintaining, and operating transportation infrastructure in this State is a public purpose within the meaning of Article V, Section 2(1) of the North Carolina Constitution. However, "[i]t is the duty and prerogative of this Court to make the ultimate determination of whether the activity or enterprise is for a purpose forbidden by the Constitution of the state." *Madison Cablevision*, 325 N.C. at 645, 386 S.E.2d at 206.

Our Supreme Court has stated that:

> [a] slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity.

Martin v. North Carolina Housing Corp., 277 N.C. 29, 43, 175 S.E.2d 665, 672-73 (1970) (internal citations and quotation marks omitted). Our Courts

> ha[ve] not specifically defined public purpose but rather ha[ve] expressly declined to confine public purpose by judicial definition[, leaving] each case to be determined by its own peculiar circumstances as from time to time it arises. Two guiding principles have been established for determining [whether a government expenditure] is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular

> municipality, and (2) the activity benefits the public generally, as opposed to special interests or persons[.]

Madison Cablevision, 325 N.C. at 646, 386 S.E.2d at 207 (internal citations and quotation marks omitted). We apply these foregoing principles to the present case.

As to the first prong of this test, "whether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action." *Maready*, 342 N.C. at 722, 467 S.E.2d at 624.

Numerous cases demonstrate the spectrum of facilities and activities which have been deemed to constitute a public purpose. Aid to railroad: *Wood v. Commissioners of Oxford*, 97 N.C. 227, 2 S.E. 653 (1887); Airport facilities: *Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946); Port Terminal Facilities: *Webb v. Port Comm'n of Morehead City*, 205 N.C. 663, 172 S.E. 377 (1934); Railway Terminal Facilities: *Hudson v. City of Greensboro*, 185 N.C. 502, 117 S.E. 629 (1923); Air Cargo Facilities: *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 554 S.E.2d 331 (2001). These cases establish that providing public transportation infrastructure has long been held to be within the permissible scope of governmental action.

As to the second prong of the *Madison Cablevision* test,

> activities are considered constitutional so long as they *primarily* benefit the public and not a private party: It is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community. Moreover, an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.

Peacock v. Shinn, 139 N.C. App. 487, 493-94, 533 S.E.2d 842, 847 (2000) (internal citations and quotation marks omitted) (emphasis in original).

Keeping these principals in mind, the expenditure in the present case clearly serves a public purpose. The General Assembly recognized that the State's road system was becoming increasingly congested and overburdened with traffic. The legislature sought to alleviate the transportation needs of the State by authorizing the NCDOT to enter into

agreements with private entities to finance transportation infrastructure in this State pursuant to the P3 Statute. The expenditure the P3 Statute authorizes should "provide immediate travel time reliability along I-77 from Uptown Charlotte to the Lake Norman area[,]" a stated purpose of the Project. Although Mobility will finance, construct, operate, and maintain the Project, gaining incidental private benefit, the government expenditure primarily benefits the public. Mobility's involvement as a private actor and the possibility that not every citizen in the community may use the Project's toll lanes do not negate the public purpose of the expenditure.

Plaintiff cites to the holding in *Foster* and argues that the facts before us are "more constitutionally troubling[.]" In *Foster*, the North Carolina Medical Care Commission Hospital Facilities Act, enacted in 1971 and found in N.C. Gen. Stat. §§ 131-138 to 131-162, was challenged. *Foster*, 283 N.C. at 113-14, 195 S.E.2d at 520. The act in question vested in the North Carolina Medical Care Commission the authority to effectuate a plan to issue revenue bonds to finance construction of public and private hospital facilities. *Id.* at 115-16, 195 S.E.2d at 521-22. The *Foster* Court noted that while it was "well settled that the expenditure of tax funds for the construction of a hospital, to be owned and operated by the State, a county, a city, town or other political subdivision of the State, is an expenditure for a public purpose[,]" it also recognized that "[i]t does not necessarily follow . . . that the construction and operation of the privately owned hospital is for a public purpose, within the meaning of the constitutional limitation upon the use of tax funds." *Id.* at 125, 195 S.E.2d at 527. The Court reasoned that "[w]hile the Act now before us provides for ownership of the acquired property by a public agency until the bonds issued to finance the contemplated construction are retired, the Act has no purpose separate and apart from the operation by and ultimate conveyance of the hospital facility to the lessee thereof." *Id.* at 127, 195 S.E.2d at 528. Accordingly, the Court held that "the expenditure of public funds raised by taxation to finance, or facilitate the financing of, the construction of a hospital facility to be privately operated, managed and controlled is not an expenditure for a public purpose" and was prohibited by Article V, Section 2(1) of the North Carolina Constitution. *Id.* at 127, 195 S.E.2d at 528-29.

We find *Foster* distinguishable. In *Foster*, the North Carolina Supreme Court held that there was no purpose separate from the operation by and ultimate conveyance of the hospital facility to the lessee. Once the bonds were paid, the North Carolina Medical Care Commission was to convey title to such facility to the lessee, a private entity. Here, the Project is to

provide travel time reliability and Mobility's private benefit is incidental to the public purpose. Under Article 2 of the Comprehensive Agreement, all of the infrastructure constructed by Mobility will be owned by the State. Mobility has "no fee title, leasehold estate, possessory interest, permit, easement or other real property interest of any kind in or to the Project or the Project Right of Way" and Mobility's property interests are "limited to contract rights constituting intangible personal property (and not real estate interests)." Furthermore, the Comprehensive Agreement limits Mobility's role in the Project to fifty years.

For the reasons stated above, we hold that the trial court did not err by concluding that the Project's expenditures constituted a public purpose pursuant to Article V, Section 2(1) of the North Carolina Constitution.

C. Turnpike Statute

[3] Plaintiff's third argument on appeal is that the trial court erred by failing to conclude that the Comprehensive Agreement violated the Turnpike Statute.

First, plaintiff contends that Mobility's design plan for the Project violates N.C. Gen. Stat. § 136-89.199 by reducing the number of existing non-toll general purpose lanes from four to three.

N.C. Gen. Stat. § 136-89.199 provides as follows:

> Notwithstanding any other provision of this Article, the Authority may designate one or more lanes of any highway, or portion thereof, within the State, including lanes that may previously have been designated as HOV lanes under G.S. 20-146.2, as high-occupancy toll (HOT) or other type of managed lanes; provided, however, that such designation *shall not reduce the number of existing non-toll general purpose lanes*. In making such designations, the Authority shall specify the high-occupancy requirement or other conditions for use of such lanes, which may include restricting vehicle types, access controls, or the payment of tolls for vehicles that do not meet the high-occupancy requirements or conditions for use.

N.C. Gen. Stat. § 136-89.199 (2015) (emphasis added).

A review of the Comprehensive Agreement establishes that plaintiff's argument fails. The Comprehensive Agreement explicitly states that the Project will not reduce the number of existing non-toll general purpose lanes.

> Developer shall design and construct the Project to provide at a minimum the same number of Existing General Purpose Lanes within the Existing ROW as of the Proposal Due Date. Developer shall not eliminate, reduce the width of or otherwise permanently restrict access to existing ramps and loops.

[4] Next, plaintiff argues that the Comprehensive Agreement violates N.C. Gen. Stat. § 136-89.183(5) and is therefore void for illegality. Plaintiff contends that while N.C. Gen. Stat. § 136-89.183(5) requires review by the Board of Transportation, Joint Legislative Transportation Oversight Committee, and Joint Legislative Commission on Governmental Operations thirty days prior to the effective date of any toll or fee, the Comprehensive Agreement fails to require the same. Plaintiff's argument is misplaced.

N.C. Gen. Stat. § 136-89.183(a)(5) gives the Turnpike Authority power "[t]o fix, revise, charge, retain, enforce, and collect tolls and fees for the use of Turnpike Projects" and requires that "[t]hirty days prior to the effective date of any toll or fee . . . the Authority shall submit a description of the proposed toll or fee to the Board of Transportation, the Joint Legislative Transportation Oversight Committee and the Joint Legislative Commission on Governmental Operations for review." However, N.C. Gen. Stat. § 136-89.183(a)(5) is not applicable to this case. The P3 Statute unambiguously states that:

> *Notwithstanding the provisions of G.S. 136-89.183(a)(5)*, all initial tolls or fees to be charged by a private entity shall be reviewed by the Turnpike Authority Board. Prior to setting toll rates, either a set rate or a minimum and maximum rate set by the private entity, the private entity shall hold a public hearing on the toll rates, including an explanation of the toll setting methodology, in accordance with guidelines for the hearing developed by the Department.

N.C. Gen. Stat. § 136-18(39a)(f)(3) (emphasis added). Thus, while N.C. Gen. Stat. § 136-89.183(a)(5) may apply to some tolls of the North Carolina Turnpike Authority, it does not apply to the Project at issue in this case.

Accordingly, we reject plaintiff's argument that the trial court erred by failing to conclude that the Comprehensive Agreement violated the Turnpike Statute.

D. Authority to Tax

[5] In its last argument on appeal, plaintiff asserts that the trial court erred by failing to conclude that the General Assembly unconstitutionally delegated its authority to tax to the NCDOT, in violation of Article I, Section 8 and Article II, Section 23 of the North Carolina Constitution and the Due Process Clause of the United States Constitution. Specifically, plaintiff argues that while the North Carolina Constitution "forbids the delegation by the General Assembly to a non-elected body the power to impose or forgive taxes[,]" the legislature has granted unto Mobility the authority to impose and collect taxes. Furthermore, plaintiff contends that it was "denied due process in the manner in which these tax liabilities were imposed upon it[.]"

Plaintiff's entire argument is premised on an issue that has already been decided by our Supreme Court. In *North Carolina Turnpike Authority*, the Supreme Court stated that:

> Tolls are not taxes. A person uses a toll road at his option; if he does not use it, he pays no toll. Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property or improvements made, and their amount is determined by the cost of the property or improvements.

North Carolina Turnpike Authority, 265 N.C. at 116-17, 143 S.E.2d at 325 (citations and quotation marks omitted). Because tolls do not constitute a tax within the meaning of the Constitution, the limitations of Article I, Section 8 and Article II, Section 23 of the North Carolina Constitution do not apply and plaintiff's due process argument is similarly without merit.

IV. Conclusion

For the reasons stated above, we affirm the order of the trial court, granting summary judgment in favor of defendants.

AFFIRMED.

Judges McCULLOUGH and INMAN concur.

Judge Douglas McCullough concurred in this opinion prior to 24 April 2017.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 2 May 2016)

BINKLEY v. BINKLEY No. 16-846	Forsyth (14CVS5766)	Affirmed
BRAY v. SWISHER No. 16-928	Forsyth (15CVS7690)	Affirmed
BUCKNER v. UNITED PARCEL SERV. No. 16-1110	N.C. Industrial Commission (13-740862)	Affirmed
COHEN v. CONT'L MOTORS, INC. No. 16-792	Nash (15CVS1134)	Affirmed
COOK v. THOMAS No. 16-712	New Hanover (15CVS526)	Reversed
GEOGHAGAN v. GEOGHAGAN No. 16-711	Mecklenburg (09CVD26047)	Dismissed
GROSSLIGHT v. N.C. DEP'T OF TRANSP. No. 16-983	Cumberland (15CVS5109)	Dismissed
IN RE B.D. No. 16-1037	Mecklenburg (15JT118-119)	Affirmed
IN RE B.N.M. No. 16-1012	Watauga (10JA33)	Reversed in part; Affirmed in part
LIPPARD v. HOLLEMAN No. 16-886	Iredell (13CVS2701)	Vacated and Remanded
MEDLIN v. MEDLIN No. 16-863	Yadkin (12CVD348)	Affirmed
OATES v. PARKER No. 16-1053	Sampson (15CVS494)	Affirmed
PHAN v. CLINARD OIL CO., INC. No. 16-1083	Davidson (15CVS3399)	Reversed
ROWE v. ROWE No. 16-1072	Carteret (11CVD1123)	REVERSED IN PART; VACATED IN PART; AND REMANDED.

ROWE v. ROWE No. 16-1073	Carteret (03CVD845)	REVERSED IN PART; VACATED IN PART AND REMANDED.
ST. JOHN v. THOMAS No. 16-847	Union (15CVS3030)	Affirmed
STATE v. BELL No. 16-798	Mecklenburg (14CRS236703-04)	No Error
STATE v. BRADLEY No. 16-917	Mecklenburg (15CRS214973-74) (15CRS24414)	No Error
STATE v. CARPENTER No. 16-973	Avery (13CRS50497)	NO PLAIN ERROR; REMANDED FOR RESENTENCING.
STATE v. CATES No. 16-672	Alamance (13CRS57989)	No Error
STATE v. COLLINS No. 16-901	Columbus (11CRS185-186) (11CRS50217)	No Error
STATE v. DAYE No. 16-1119	Iredell (15CRS2614) (15CRS51896)	Vacated
STATE v. ERVIN No. 16-1126	Mecklenburg (15CRS212728) (15CRS22622) (15CRS34741)	Dismissed in Part; No Error in Part; No plain Error in Part.
STATE v. JENKINS No. 16-717	Mecklenburg (13CRS235628-29) (13CRS45241)	No Error
STATE v. KNOLTON No. 16-671	Scotland (12CRS52648) (12CRS52658) (13CRS336)	No Error
STATE v. LINDSEY No. 16-742	Burke (14CRS1729-30)	No Error

STATE v. NORMAN No. 16-1005	Washington (13CRS50002-05)	VACATED AND REMANDED FOR NEW TRIAL IN 13 CRS 50005; REVERSED IN PART AND REMANDED FOR RESENTENCING IN 13 CRS 50004
STATE v. PANNELL No. 16-852	Swain (14CRS50039)	Reversed and Remanded for Resentencing in Part; No Error in Part.
STATE v. PERRY No. 16-862	Nash (15CRS52463) (15CRS52610) (15CRS52612-13)	No Error
STATE v. STROUD No. 16-989	Mecklenburg (13CRS222266-67) (13CRS222658) (13CRS43492)	No Prejudicial Error
STATE v. VIDOVICH No. 16-773	Randolph (14CRS53004)	No Error
WILSON v. ASHLEY WOMEN'S CTR., P.A. No. 16-1004	Gaston (11CVS4007)	No Error

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS